The Arbitration Review of the Americas

2016

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This edition provides an unparalleled annual update – written by the experts – on key developments in Argentina, Bolivia, Brazil, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Dominican Republic, Ecuador, Mexico, Panama, Peru the United States and Venezuela.

Generated: December 4, 2024

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CAM/CCBC

Lenora Hage Santos Bento de Faria and **Carlos Suplicy de Figueiredo Forbes**

CAM-CCBC (Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada)

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THE GENESIS OF BRAZILIAN INSTITUTIONAL ARBITRATION

Almost 20 years ago, arbitration in Brazil was embryonic, to say the least: while it was provided for in the Brazilian legal system, there was no specific arbitration law; and even after an arbitration law was enacted, its constitutionality was heavily debated for several years.

It was in this adverse context that the Center for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada (CAM/CCBC) was created. As a pioneer in the field, the Center weathered those early years, contributing greatly to the debate. When arbitration eventually flourished, the CAM/CCBC found itself in the unique position of rendering a high-level, world-class dispute administration service.

In 1979, a group of lawyers and professors of the University of São Paulo founded the CAM/CCBC with the audacious aim of developing the idea of alternative dispute resolution. The Center was clearly ahead of its time: it took 17 years for the Brazilian arbitration law to be passed in 1996 and 22 years until the country's Supreme Court recognised its constitutionality in 2001.

With arbitration being recognised as a viable dispute resolution method, in 2002 Brazil finally ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), bringing national arbitration in line with international standards.

Since then, arbitration in Brazil has been experiencing exponential growth year by year and the country is now one of the top users of arbitration worldwide. As an early adopter, when the arbitration boom came about, the CAM/CCBC was prepared to meet the sudden demand.

As a natural industry leader, the CAM/CCBC has contributed to society's acceptance of arbitration in several respects:

- the Secretariat provides unique case management services;
- the CAM/CCBC Arbitration Rules reflects the recent international trends and the most established doctrine in arbitration; and
- the Center fosters knowledge in the field by encouraging educational activities and concluding cooperation agreements with many arbitral institutions around the world.

Along with its institutional role, the Center has set the standard for quality secretariat services, providing highly efficient proceedings, within the framework of its modern arbitration rules, while counting with cutting-edge facilities which are unparalleled in the whole of Latin America.

In no small measure due to the CAM/CCBC's contribution, Brazilian arbitration has developed considerably and Brazil is today a viable seat for international arbitrations. This proves that the role of the arbitration chamber can exceed traditional case management.

A unique formula of case management

The CAM/CCBC's case management is founded upon four major pillars:

- confidentiality;
- fair and equitable treatment for the parties;

- impartiality and independence; and
- flexibility.

Bearing those ideals in mind, the administration services of the Center, aligned with the provisions of the Arbitration Rules, are designed to provide efficiency and celerity to the proceedings.

Once a request for arbitration is filed in the CAM/CCBC, it receives a registration number and the case is randomly assigned to a case manager. From the beginning to the end of the procedure, that one case manager will accompany every step of the proceedings. The case manager will be the direct channel between the parties, lawyers, arbitrators and the Center.

Having the same case manager during the whole arbitration enables a more dynamic and personal treatment for parties and arbitrators.

While each arbitration is individually managed, the Secretariat as a whole works in unison, following pre-established procedures that have been certified according to ISO 9001:2008. The ISO certification attests to the consistency of the Center's services at each step of every arbitration.

To cope with the significant increase in demand, the CAM/CCBC's staff has doubled since 2013.

The Secretariat is composed by a team of highly qualified case managers, all of whom are certified lawyers with extensive practical and academic experience in alternative dispute resolution.

The CAM/CCBC case managers and their respective assistants work full time, providing administrative support to parties, arbitrators, mediators and lawyers. Our staff is proficient in several languages such as English, French, Spanish and German, managing an ever-more internationalised docket of disputes, seated in Brazil and abroad.

Overseeing the quality of the CAM/CCBC's case management are the deputy secretary general and the assistant deputy secretary general, specialised attorneys with years of experience in the field and a track record of hundreds of successfully administered arbitrations.

Therefore, the CAM/CCBC provides a unique formula of case management guaranteeing a tailor-made administration to meet the peculiarities of the cases, in a consistent and highly efficient manner.

THE CAM/CCBC HEARING CENTRE

Launched in 2013, the CAM/CCBC's new hearing centre is state of the art, fully equipped and suitable for lawyers' and arbitrators' every need in hearings both large and small.

The hearing centre consists of four meeting rooms and several small supporting rooms, where lawyers may talk freely, and where witnesses may be comfortably allocated prior to depositions.

In addition, the centre also has an auditorium that seats up to 40 people, a perfect venue for lectures, small conferences and workshops sponsored by the CAM/CCBC.

The logistics and high technology available in the meeting rooms also contribute to the success of the hearings and meetings. The available infrastructure enables lawyers and arbitrators to focus solely on the cases.

The case manager designated to follow the proceedings will coordinate all the administrative logistics, including catering services, audio recording, simultaneous translations and other services, before, during and after hearings.

The CAM/CCBC's case manager contracts the best and most cost-effective suppliers necessary to meet the specific requirements of each hearing or meeting.

Parties are not charged any additional costs for the use of the CAM/CCBC's facilities. Upon request by the arbitrators, the Secretariat will schedule meetings and manage all the required logistics.

The CAM/CCBC Arbitration Rules

The CAM/CCBC Arbitration Rules are a key element to the Center's success. The Rules express the most recent trends and the best and most established doctrine in international arbitration.

In 2011, the Center's arbitration rules were revised to reflect many aspects of the Chamber's established and recent practices.

In force since 2012, the new Arbitration Rules are guided mainly by the principle of party autonomy, and seek to inject a considerable degree of flexibility in the arbitral proceedings. Under the new rules, the parties are free to modify the standard procedure to a considerable extent, as long as the administrative work of the Center is not affected.

Aligned with most internationally recognised arbitration rules, the CAM/CCBC Rules allow the parties to agree on several aspects of the proceedings, as well as, to establish the pace and frame of the arbitral procedure.

A principal focus of the Rules is the constitution of the arbitral tribunal, which is a key element for a successful arbitration.

In this regard, the CAM/CCBC provides a list of arbitrators comprised of more than 100 industry-leading professionals, specialised in a wide range of subjects and with several different nationalities, including Brazilians, Americans, French, Russians, Germans, Portuguese, Spanish, Colombians, Argentinians and Chileans. While the parties may choose arbitrators not in the list, the president of the Arbitral Tribunal should preferably be a list member.

The Rules also provide a specific mechanism allowing the parties to challenge the appointment of arbitrators on some grounds. Once a challenge is posed, the arbitrator will be afforded the opportunity to provide additional information or clarifications as may be necessary to satisfy the parties' contentions. If a party chooses to maintain its challenge, the matter will be submitted to a special committee composed of three members of the list of arbitrators to be appointed by the president of the CAM/CCBC.

The CAM/CCBC Arbitration Rules – Recent Improvements

Over the years, the matter of advances on costs has hindered the proper development of many arbitral proceedings. To tackle this issue, in 2015 a new table of expenses was applied.

Experience has shown that the old method used for advance son costs has proven to be unpredictable for both parties and arbitrators. The arbitrators' fees were charged per hour and the administrative fees were collected on a monthly basis. This old formula has had a negative impact on the fluidity of arbitral proceedings for a long time.

Pursuant to the Center's experience, the president of the CAM/CCBC, accounting for the advisory committee consultancy, has passed a new method of charging arbitration costs based exclusively on the estimated amount in dispute.

Under the new table of expenses, most advances on costs are charged at the beginning of the proceedings in a single instalment. The relevant values will follow the CAM/CCBC's standard fee-schedule in view of the total amount in dispute. Moreover, the costs related to counterclaims may be calculated in parallel to those of the original claims upon request by the interested party.

The provisions set forth in the new table of expenses, which are binding on the parties and the arbitrators, aim at providing more predictability for users of arbitration and at avoiding unfair practices, like 'cost dumping' by wealthier parties.

The CAM/CCBC Administrative Resolution No. 3 – Arbitrations Involving State Entities

In 2014, the president of the CAM/CCBC passed Resolution No. 3, dealing specifically with disputes involving state-owned enterprises and public administration entities. The Resolution implemented the necessary adjustments to the Arbitration Rules in order to meet the particularities of such cases.

Among other peculiarities, under Resolution No. 3, arbitrations involving public entities will follow the constitutional principle of publicity of the proceedings, except as may otherwise be required by law.

Resolution No. 3 followed a trend that was eventually made into law by the latest revision of the Brazilian Arbitration Law, in 2015, which expressly allowed state entities to be part to arbitration proceedings.

The enactment of Resolution No. 3 was the result of a commission specially instituted to discuss arbitration involving public administration entities. Thus, the CAM/CCBC was already prepared to face the new demand which has already begun to increase.

ENCOURAGEMENT OF EDUCATIONAL ACTIVITIES

Understanding its role in the development of ADRs in Brazil and elsewhere, the CAM/CCBC organises educational activities and sponsors the academic activities from graduation to the highest level of scientific knowledge.

The Center promotes education in alternative dispute resolution by sponsoring several renowned events, such as the International Council for Commercial Arbitration Congress (ICCA Congress) and the ***Willem C Vis Moot***. It also organises joint Congresses with many entities, such as the Brazilian Committee for Arbitration, the Institute for Transnational Arbitration and the National Council for Mediation and Arbitration Institutions.

The CAM/CCBC encourages study groups, courses and mock competitions. The engagement of young law students is very important to the Center, which considers that the students of today will be the arbitrators of tomorrow.

In 2014, the presence of the CAM/CCBC in the ***Willem C Vis Moot*** was truly remarkable: the CAM/CCBC Arbitration Rules were applied in that renowned competition, attesting to the credibility of the Rules and the Center's truly international status.

The Center also encourages specialisation programmes for experienced lawyers and students, such as the scholarship for Brazilian lawyers to attend the American University Washington College of Law Specialized Summer Program on International Commercial Arbitration and the scholarship for PhD students at the Max Plack Institute of Comparative Law and Private International Law in Hamburg, Germany.

In addition, the Center sponsors or provides institutional support to several local and international arbitration events.

One of the most renowned events organised by CAM/CCBC was in association with the Peruvian Arbitration Institute: the 2014 first Pan-American Arbitration Congress in São Paulo. The congress highlighted the importance of the continent in arbitration around the globe.

High-level debates lasted three days concerning the present, the past and the future of arbitration. The discussions were led by some of the most recognised international arbitration specialists.

The scope and quality of the first Pan-American Arbitration Congress expressed and reaffirmed the development of arbitration in the region and its importance for the international community.

The CAM/CCBC Internationalisation Process – The Importance Of Cooperation Agreements

As part of its focus on internationalisation, the CAM/CCBC entered into cooperation agreements with several international arbitration institutions, such as the Permanent Court of Arbitration in the Hague, the German Institute of Arbitration (DIS), the Chamber of Arbitration in Milan in Italy, the CAM-Santiago in Chile, the Chamber of Commerce and Industry in Brussels in Belgium, and the International Centre for Dispute Resolution in the United States, among others.

The scope of those agreements may vary from institution to institution, but essentially they serve as mechanisms to promote the development of arbitration jointly in the correlated countries.

Through those agreements, the institutions may exchange information, as well as, perform joint courses and events such
as the CAM/CCBC and DIS joint events in São Paulo and Berlin, as a result of the partnership developed by both institutions.

Furthermore, the cooperation agreements may also cover exchange of personnel, which means that both arbitral institutions can benefit from each one's best practices and learn from different experiences. In addition to knowledge, the partner's institutions may share their available structure and headquarters when needed.

NEXT STEPS

Currently, the CAM/CCBC is undergoing a transition. In May 2015, a new board of directors was elected and with it a new president, vice presidents and the secretary general, all of whom are recognised practitioners of arbitration in Brazil and abroad.

Besides the current board of directors, the president of the CAM/CCBC is advised by an advisory committee composed of its five former presidents and at least five elected members of the list of arbitrators.

Besides having an enormous legacy to live up to, the new presidency will face considerable challenges in the next few years.

Considering the fact that the CAM/CCBC grew faster than expected, some of the major concerns are the investment on administrative personnel and the Center's headquarters. The project is already ongoing and encompasses hiring extra support personnel for the pure administrative activities and reforming the administrative areas to provide more filing space and comfort for the Secretariat.

Nonetheless, the biggest project envisaged for the second half of 2015 is the launch of a brand new platform which will boost the Secretariat's administration services into a higher level of efficiency.

This new platform will collect data on arbitral proceedings, including the financial aspects. This state-of-the-art system will make case information available online while preserving the confidentiality of arbitral proceedings.

At first, the new system will function solely for the members of the CAM/CCBC. However, the idea is to expand the online platform to arbitrators and then to lawyers, in such a way that they will be able to follow a particular procedure remotely in a single click from wherever they are.

Along with the new platform, the Center will also provide online extracts of arbitral awards rendered by Arbitral Tribunals according to the CAM/CCBC Arbitration Rules. This project is already ongoing and will probably be available to the general public in the near future.

Another relevant project for the future is the development of the already existing commissions in specific areas of law and dispute resolution, such as intellectual property, corporate advocacy, dispute boards, mediation and public administration, created with the purpose of fostering knowledge.

Each commission has a coordinator and a representative CAM/CCBC member, who is responsible for organising meetings and contributing to debates with the Center's own experience in a particular field.

More cooperation agreements should be signed soon as the Center is negotiating terms with several other institutions interested in becoming partners.

Furthermore, in relation to the cooperation agreements, the CAM/CCBC is studying the possibility of concluding international exchanging programmes between case managers from other arbitration institutions, an idea that was born in the last presidential mandate and is now being implemented.

The Center will launch a temporary trainee programme in its Secretariat for students pursuing an LLM or a specialisation programme in dispute resolution as another way to promote the CAM/CCBC's services and to spread its differentials.

Finally, the Center will continue to sponsor educational activities and events related to arbitration in Brazil and worldwide. Nonetheless, the CAM/CCBC's most audacious project for 2015 is to promote a second and much bigger Pan-American Congress, this time

focusing the debates on the future of arbitration in the Pan-American region and the sensitive topics.

CONCLUSION

The role of local arbitral institutions is intimately connected with the development of arbitration in the region.

The CAM/CCBC's own development reflects the exponential growth of regional institutions and their potential to gain more space in the international market.

The Center has proven that its activities go beyond the administration of arbitral proceedings. It is constantly contributing to the development of arbitration in its day-to-day activities.

By sponsoring educational activities and exchanging experience through cooperation agreements, the CAM/CCBC helps to foster the knowledge on ADRs locally and internationally.

The Center's institutional role guides it towards accomplishing its final objective which is to provide highly efficient ADR administration, especially in arbitration. As an international player, the Center promotes Brazil as a viable seat for international arbitral proceedings.

Being a leader in the Brazilian market and a local reference for international arbitration, the CAM/CCBC attributes its success to an outcome of good practices and services.

The CAM/CCBC experienced several changes over the past couple of years. The Center has overcome its own expectations of growth in this period of time. In 2014 alone the CAM/CCBC registered 95 new cases, and 72 new cases up to July 2015.

Since its foundation, the Center registered 600 arbitral proceedings, at a total value of over US$8 billion. Recent improvements and the ones projected for the near future demonstrate the Center's ability to host an even larger number of high-value arbitrations.

After its 35th anniversary, in 2014, the oldest arbitration centre in the country has proven to be not only a Brazilian pioneer but also a consolidated leader in dispute resolution in Latin America. Undeniably, the CAM/CCBC plays a significant role in the international arbitration scenario.

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Innovation in International Arbitration

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Summary

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Two decisions by US courts this year illustrate the divergent practices that can arise when domestic courts in states with federal systems are asked to recognise arbitral awards issued under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) requires member states, including the United States, to recognise and enforce ICSID awards. Neither the Convention nor the US statute implementing its provisions, however, specifies the process by which recognition shall occur. In a ruling issued in February 2015, the first-instance federal court in Manhattan refused to vacate an earlier decision granting an ex parte petition to recognise an ICSID award that had been filed the day after the arbitral tribunal issued the award.[1] Three months later, the first-instance federal court in Washington, DC reached the opposite conclusion, holding that the only appropriate procedure for recognising an ICSID award against a respondent state was through commencement of a plenary action with notice served on the state in accordance with the Foreign Sovereign Immunities Act (FSIA).[2] The petitioner in the second case, along with the other award creditors, then sought and obtained ex parte recognition in New York.

Both courts issued reasoned opinions in support of their respective holdings, but reached diametrically opposite conclusions about the intention of the drafters and the meaning of the text, of the Convention and the US implementing statute. Absent guidance from a higher federal court, these conflicting decisions may influence the choice of US forum for recognising and enforcing ICSID awards. Specifically, where possible, award creditors may prefer to seek recognition of ICSID awards in New York to gain the benefits of a quicker path to enforcement that offers less opportunity for an award debtor to transfer, conceal or dissipate assets.

THE TREATY AND STATUTORY CONTEXT

A cornerstone of ICSID arbitration is the status accorded to awards in the courts of its 159 member states. National courts lack the power to set aside or modify ICSID awards, which are subject to review, revision, and annulment only within the ICSID system.[3] In addition, article 54(1) of the Convention requires member states to 'recognize an [ICSID] award ... as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State.'[4] For states with federal constitutions, the article further provides that each 'may enforce [the ICSID] award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state'.[5]

Both the Convention and practice draw a distinction between recognition, on one hand, and enforcement or execution on the other.[6] Recognition is generally the first step toward execution: the award creditor obtains a judgment which then serves as the basis for enforcement within that jurisdiction, such as through attachment of assets.

The United States has implemented article 54(1) through a federal statute, 22 USC section 1650(a) (ICSID Enabling Statute), which provides that an ICSID award 'shall create a right arising under a treaty of the United States', with 'pecuniary obligations' that 'shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States' in the United States.[7] The ICSID

Enabling Statute does not expressly use the term 'recognise', and does not prescribe the procedural mechanism by which an ICSID award is converted into a federal judgment, leaving room for varying approaches in the lower federal courts.

EX PARTE MOTIONS ARE ALLOWED: MOBIL V VENEZUELA (NEW YORK)

The February 2015 decision in *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela* maintained the long-standing practice of the United States District Court for Southern District of New York, allowing ex parte petitions for recognition of ICSID awards.

The subject of the underlying arbitration is a familiar fact pattern in investment treaty arbitration. Following the expropriation of its assets in 2007, ExxonMobil, through subsidiary entities (Mobil), commenced an ICSID arbitration against Venezuela and eventually obtained an award of over US$1.6 billion in damages, plus interest, on 9 October 2014.[8]

The next day, Mobil filed an ex parte petition in the Southern District seeking recognition of the award under the ICSID Enabling Statute, and the court granted the petition after an ex parte hearing. Mobil immediately sent a letter to counsel for Venezuela notifying it of the judgment and demanding payment.[9] Four days later, on 14 October 2014, Venezuela sought to vacate the judgment, claiming that the ICSID Enabling Statute does not authorise federal courts to borrow the ex parte recognition procedure of the forum state, as the Southern District has routinely done,[10] and even if it did, the FSIA supersedes that statute where recognition actions are brought against foreign sovereigns, so as to impose service, personal jurisdiction and venue requirements that were not met in that case.[11]

The ***Mobil*** court rejected both arguments.

First, the court held that the case law of the Southern District and the relevant federal appeals court 'overwhelmingly supports looking to the law of the forum state, here, New York, to fill the procedural gap in section 1650a as to the manner in which a recognition proceeding is to occur'.[12]

'The decisive issue,' the court explained, 'is whether there is a significant conflict between some federal policy or interest and the use of state law.'[13] The court concluded that Venezuela had failed to identify any such conflict. To the contrary, 'using the streamlined recognition procedure' under New York state law 'effectuates the policy interests underlying the ICSID enabling statute, because, by facilitating conversion of an ICSID award to a judgment, it facilitates granting 'full faith and credit' to the award and enables the creditor to move towards enforcing it.'[14] In the court's view, the directive in the ICSID Implementing Statute 'reflects that Congress, like the ICSID Convention that it was implementing, intended that ICSID awards be expeditiously recognized, free from substantive review' by national courts.[15] In short, 'a foreign party has no valid ground to claim offense at a streamlined recognition procedure' for ICSID awards, especially because a foreign sovereign remains 'free to challenge the later attachment of or attempted execution on its assets'.[16]

Second, as a matter of first impression in that district, the New York court found that the FSIA did not supersede the ICSID Enabling Statute and impose procedural requirements for recognition of ICSID awards against a foreign state.[17]

As a threshold issue, the New York court rejected Venezuela's contention that it lacked subject matter jurisdiction under the FSIA. It found that two exceptions to sovereign immunity in the FSIA itself – those for arbitration awards and an implied waiver of immunity – provided jurisdiction for actions arising out of ICSID awards.[18] The court went further

and observed that there was, 'arguably, a third statutory basis for subject matter jurisdiction over such an action,' because the general FSIA provision on sovereign immunity expressly states that such immunity is 'subject to existing international agreements to which the United States is a party at the time of enactment of this Act'.[19] Noting that the ICSID Convention and its implementing statute predated the FSIA by a decade, the court concluded that 'the italicized opening clause, by its terms, leaves in place – and reflects Congress's intention not to disturb – the provisions of the ICSID Convention and enabling statute'.[20]

Turning to the whether the FSIA's requirements as to service of process and venue apply in the context of recognition of ICSID awards, the court acknowledged that under cardinal rules of statutory construction, it must enforce the clear text of the statute as written.[21] To decide whether the text is in fact clear, however, the court must assess whether its language has a 'plain and unambiguous meaning,' which is 'determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole'.[22]

Applying these principles, the New York court found that the FSIA's language does not have a 'plain and unambiguous meaning with regard to the particular dispute' before it, and at most, leaves congressional intent unclear as to whether the FSIA's requirements apply in the context of recognition.[23] To resolve the ambiguity, the court considered the broader context of the statutory schemes concerning actions involving sovereigns and found significant indications of congressional intent to allow for simple and automatic recognition of ICSID awards – not the contested litigation of a plenary action.[24] The court also noted that this approach was consistent with the drafting history of the ICSID Convention and its objective of creating a 'self-contained regime' in which awards would not be subject to judicial review, and observed that 'legislatures in a number of other contracting states [had drawn] the same conclusion', permitting 'immediate, and ex parte, recognition of ICSID awards'.[25]

The court reasoned that the approach urged by Venezuela, requiring that award creditors seeking recognition comply with the FSIA's requirements for commencing a plenary action 'resolvable only upon full motions practice', would be 'deeply problematic,' because it 'would bring the FSIA into grave tension with the objectives of the ICSID Convention and of Congress'.[26] Venezuela's arguments could not be accepted, the court concluded, because the ICSID Contracting States and the US Congress 'sought to depart from, not to double down on, the model of a contested recognition process used under the New York Convention'.[27]

Finally, since parties cannot in any event challenge ICSID awards in national courts, the court held that '[r]eading into the FSIA's silence a congressional intention to graft onto the ICSID enabling statute the FSIA's [procedural] requirements', and oblige parties to commence a separate suit for recognition, 'would not serve any practical purpose'. Instead, '[i]t would merely provide an avenue for delay.'[28]

The court in ***Mobil*** therefore denied Venezuela's motion to vacate the ex parte judgment, but stayed enforcement of the judgment pending ICSID's resolution of Venezuela's application to revise the award. Venezuela appealed the court's decision in March 2015, and its appeal remains pending at the time of publication.[29]

EX PARTE MOTIONS ARE NOT ALLOWED: MICULA V ROMANIA (WASHINGTON, DC)

In May 2015, three months after the ***Mobil*** decision, the district court for the District of Columbia refused to allow an ex parte petition brought by Viorel Micula, a Swedish investor, for recognition of an ICSID award of over US$116 million against Romania.[30]

While acknowledging that the Southern District of New York 'routinely recognized ICSID awards on an ex parte basis', the Washington, DC court ultimately decided to follow a 2012 ruling from another district – the Eastern District of Virginia in ***Continental Casualty v Argentina*** – which had held that converting an ICSID award into a domestic judgment required service on the foreign sovereign.[31]

The***Micula*** court found that the Virginia court's reading of the statute was 'more consistent' with the 'text and structure' of the ICSID Enabling Statute, which requires federal courts to 'enforce' ICSID awards in the same manner as state court judgments, but 'does not use the verbs "confirm" or "recognize"'.[32] Relying on references to 'actions' and 'proceedings' in a leading treatise on domestic practice and procedure within the US federal system, and the text and legislative history of the ICSID Enabling Statute, the court concluded that 'it follows that ICSID awards were intended to be enforced by plenary actions.'[33]

The DC court found further support in the fact that the legislative reports preceding passage of the ICSID Enabling Statute did not 'refer to ex parte proceedings or the need for confirmation or recognition as a precursor for enforcement, even though Congress knew that such mechanism was possible' under the Federal Arbitration Act.[34] The court also found it 'instructive' that when Congress later passed the statute implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), it authorised a streamlined procedure for confirmation of an international commercial arbitration award – demonstrating, in the court's view, that 'when Congress wants to permit ex parte confirmation of a foreign arbitration award it knows how to do so.'[35] The court held that the absence of such language 'is strong evidence that Congress did not intend for parties who had won ICSID awards to confirm such awards' through an ex parte process, and ruled that the petitioner 'must file a plenary action ... to convert his ICSID award into an enforceable judgment in this court'.[36]

Finally, the court in***Micula*** held that its interpretation of the ICSID Enabling Statute 'does not conflict with or abrogate any way, the United States' obligations under Article 54 of the Convention', because 'Article 54(3) of the Convention contemplates that 'the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.'[37]

The opinion did not discuss, however, a number of issues which the New York court had found critically important to its decision to permit ex parte proceedings, including:

- whether Congress intended the 'full faith and credit' language in the Enabling Statute as a direction to courts to spare parties the burden and cost of repeat litigation;
- whether applying the notice, personal jurisdiction and service provisions of the FSIA to the recognition and enforcement of ICSID awards would serve any practical purpose other than delay the proceedings;
- the drafting history of the ICSID Convention, and the differences between the recognition and enforcement regime for ICSID awards and the regime put in place for international commercial arbitration awards by the New York Convention; or
- whether requiring a plenary action, with attendant litigation solely on procedural questions that could have no effect on the validity of the ICSID award, was consistent with the treaty and statutory regime for the enforcement of such awards in the United States.

Having found that a plenary action was necessary, the DC court denied the ex parte petition to recognise the award in an oral order communicated to the parties in a telephonic hearing.[38]

A few days later, the ***Micula*** award creditors filed an ex parte petition for recognition of the same ICSID award. In a routine application of the practice reaffirmed in ***Mobil***, the Southern District of New York granted the petition, and issued an order directing that the award: 'shall be recognized and entered as a judgment by the Clerk of this Court in the same manner and with the same force and effect as if the Award were a final judgment of this Court, as authorized by 22 USC section 1650a and Article 54 of the ICSID Convention'.[39]

Practical Consequences

The nature of the recognition procedure applied by the US court does not affect the substantive rights of an award-debtor state. Regardless of whether the court permits ex parte petitions or requires plenary actions, states remain free to seek revision or annulment of the award within ICSID. Moreover, after the award is recognised, states can still resist enforcement or execution against their assets on immunity grounds, and continue enjoy other procedural protections under the FSIA, which only allows execution on a foreign state's assets after 'a reasonable period of time has elapsed following the entry of judgment'.[40] That period may vary depending on the jurisdiction: in New York, for example, 30 days is deemed reasonable,[41] while execution in the District of Columbia can take longer.[42]

Nevertheless, requiring an award creditor to bring a plenary action and comply with FSIA requirements for service of process, notice and venue will create an avenue for further delay in enforcement – and potentially allow award debtors more time to render themselves effectively judgment-proof in a particular jurisdiction. For example, the FSIA affords sovereigns 60 days after service to respond to actions filed against them.[43] Moreover, as the ***Mobil*** court indicated, 'having to use the time-consuming process for serving a foreign state under the Hague Convention or to litigate the adequacy of personal jurisdiction' or venue will likely lead to substantial delays.[44]

The epilogue in the ***Micula*** case amply illustrates the likely reaction of parties confronted with this lack of procedural uniformity among US courts. Absent clarification by later decisions by these courts,[45] or guidance from the relevant federal courts of appeals or the US Supreme Court, these divergent lines of authority will likely promote a form of forum shopping, where award creditors that are able to seek recognition in New York will pursue ex parte petitions and the shorter path to a domestically enforceable judgment that this process offers.[46]

Notes

1. *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela*, No. 14 Civ. 8163, – F. Supp. 3d –, 2015 WL 631409 (SDNY 13 February 2015).
2. *Micula v Government of Romania*, No. 1:14-CV-00600 (APM), – F. Supp. 3d –, 2015 WL 2354310 (DDC 18 May 2015).
3. ICSID Convention, article 53 ('(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. (2) For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to articles 50, 51 or 52.').

4. Id article 54(1) (emphases added).
5. Id (emphasis added).
6. Christoph H Schreuer, The ICSID Convention: A Commentary (2009), at 1135 (noting that the 'words 'enforcement' and 'execution' are identical in meaning' in the context of article 54 of the ICSID Convention); ICSID Convention, article 55 ('Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution').
7. 22 USC section 1650a (1966) (emphasis added). See also id ('The Federal Arbitration Act (9 USC 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.')
8. See ***Mobil Cerro Negro Ltd,*** – F. Supp. 3d –, 2015 WL 631409, at *2.
9. ***Mobil Cerro Negro Ltd***, 2015 WL 631409, Id at *2–*3.
10. New York Civil Practice Law and Rules (CPLR), article 54, entitled 'Enforcement of Judgments Entitled to Full Faith and Credit', provides that a copy of a 'foreign judgment authenticated in accordance with an act of congress ... may be filed within ninety days' of authentication along with an affidavit of the judgment creditor stating that the applicable requirements had been satisfied. The judgment debtor does not receive notice until 'thirty days after filing of the judgment and the affidavit.' CPLR sections 5402, 5403. Section 5403 does require, however, that 'the proceeds of an execution shall not be distributed to the judgment creditor earlier than thirty days after filing of proof of service.'
11. ***Mobil Cerro Negro Ltd***, 2015 WL 631409, at *2–*3.
12. Id at *7 (citing decisions of the District and the United States Court of Appeals for the Second Circuit, which also sits in Manhattan, and the decisions of which are binding on lower federal courts in New York, Connecticut and Vermont).
13. Id at *9 (internal citation and quotation marks omitted).
14. Id (emphasis in original).
15. Id.
16. Id at *10 ('whether Mobil applied for recognition of its award via a plenary lawsuit or an ex parte application ... the nature of that proceeding would not expand or contract Venezuela's substantive rights').
17. Id at *11–*24.
18. Id at *12–*13 (citing 28 USC sections 1605(a)(6)(b) & 1605(a)(1), and ***Blue Ridge Invs LLC v Argentina***, 735 F. 3d 72, 84-84 (2d Cir. 2013)).
19. Id. at *13, quoting 28 USC section 1604 (emphasis added). Section 1604 of the FSIA provides in full: 'Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.'
20. ***Mobil Cerro Negro Ltd***, 2015 WL 631409, at *13.
21. Id at *15.
22. Id.

23. Id at *17.
24. Id at *18–*22 (discussing the legislative history and text of the Enabling Statute, and noting that 'full faith and credit' has 'an acquired meaning' that 'makes final the determinations of sister states, such that, subject to exceptions inapplicable here, no attach can be made outside a state on a judgment rendered therein').
25. Id at *22 (referring to the United Kingdom, Australia and France).
26. Id at *21.
27. Id.
28. Id at *22.
29. Case No. 15-707-cv (2d Cir.).
30. See ***Micula***, 2015 WL 2354310.
31. Id at *5 (citing ***Continental Casualty Co v Argentine Republic***, 893 F. Supp. 2d 747 (ED Va 2012)).
32. Id.
33. Id at *5–*6 (emphases added) (citing Charles A Wright, Arthur R Miller & Edward H Cooper, ***Federal Practice and Procedure*** section 4469, vol. 18B, at 79 (2d ed. 2002); 28 USC section 1650a(b); House of Representatives Report No. 1741, at 3–4 (1966); Senate Report No. 1374, Appendix at 4 (1966)).
34. ***Micula***, 2015 WL 2354310, at *6.
35. Id.
36. Id.
37. Id.
38. Id at *3.
39. ***Micula v Government of Romania***, Case No. 1:15-mc-00107-P1, Amended Order and Judgment (SDNY 28 April 2015), at 3.
40. 28 USC section 1610 ('No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608 (e) of this chapter').
41. See CPLR section 5403 (Within 30 days after filing of the judgment and the affidavit, the judgment creditor shall mail notice of filing of the foreign judgment to the judgment debtor at his last known address. The proceeds of an execution shall not be distributed to the judgment creditor earlier than thirty days after filing of proof of service').
42. See A***gudas Chasidei Chabad of United States v Russian Federation***, 798 F. Supp. 2d 260, 269-70 (DDC 2011) (finding eight months' time since notice of judgment to be an adequate period for purposes of section 1610(c)) (citing ***Ned Chartering & Trading, Inc v Republic of Pakistan***, 130 F. Supp. 2d 64, 67 (DDC 2001) (collecting cases to conclude 'that other courts have found periods such as two or three months sufficient

to satisfy section 1610(c)'s requirements' and separately determining that six weeks was acceptable)).

43. 28 USC section 1608(d) ('In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.').

44. See ***Mobil Cerro Negro Ltd***, – F. Supp. 3d –, 2015 WL 631409, at *22.

45. In a footnote to its opinion, the ***Micula*** court noted that in an earlier case, another judge in the district had in fact 'concluded that ex parte recognition of an ICSID award was appropriate under the ICSID Convention' and the ICSID Enabling Statute because that process 'was consistent with the terms and purposes of the ICSID Convention, as well as the previous decisions of other courts'. ***Micula,*** 2015 WL 2354310, at *4 n. 6 (citing ***Miminco, LLC v Democratic Republic of the Congo***, No. 14-01987(RC), 2015 WL 10611555, at *2 (DDC 9 February 2015)). As of the time of publication, no subsequent decision of the DC district court had either accepted or rejected the reasoning in ***Micula***.

46. Absent a reasonable connection to another district, US federal law generally mandates filing against foreign sovereigns in the District for the District of Columbia. See 28 USC section 1391(f) ('A civil action against a foreign state as defined in section 1603 (a) of this title may be brought—(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.').

Economic Damages

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Summary

INTELLECTUAL PROPERTY DISPUTES IN INTERNATIONAL ARBITRATION – COMPENSATION ISSUES IN RECENT INVESTOR-STATE CLAIMS

INTELLECTUAL PROPERTY DISPUTES IN INTERNATIONAL ARBITRATION – COMPENSATION ISSUES IN RECENT INVESTOR-STATE CLAIMS

The importance and value of intangible assets has increased, often equaling or surpassing the value of physical assets for a company. The US Department of Commerce found that, in 2012, industries that rely on intellectual property (IP) protections supported 40 million American jobs and more than one-third of America's gross domestic product, which was approximately US$5 trillion a year.[1] The Organization for Economic Co-Operation and Development (OECD) has recognised the importance of intangible assets with its project New Sources of Growth: Intangible Assets, which includes reports on the importance of intangible assets to innovation as well as the difficulty in reporting the value of intangible assets.[2] Despite the growing importance of these assets, however, IP disputes in courts of international arbitration are relatively uncommon. For instance, of the 495 disputes that have been filed at the World Trade Organization (WTO) since January 1995, only 42 are characterised as involving IP of some kind.[3] Of the 530 disputes currently listed at the International Center for Settlement of Investment Disputes (ICSID), only three are listed as involving IP as their main subject of dispute.[4]

Although many IP disputes may be international in nature, almost all IP rights are national. The exception is domain name rights, which are governed by the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN assigns domain names and has a set of policies and procedures for disputes.[5] Copyrights also find some international protection under the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), which the US joined in March 1989.[6] Other IP such as patents and trademarks, however, must typically be registered with the appropriate national agencies. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires that its members provide certain protections for IP rights, but does not provide international rights for the IP. For instance, TRIPS requires that patents must be enforceable for at least 20 years,[7] but does not provide for an international patent that would be enforceable in all member states. Contractually, parties may choose to agree that any disputes over IP rights be arbitrated and they may contractually choose the venue or rules that will govern that arbitration.

Recently, tobacco companies have been involved in several international arbitration matters involving alleged violations of their IP. Two claims have been filed by investors for violations of bilateral trade agreements and involve a claim of damages relating to IP investment in those states. Five additional claims, similar to one another, have been filed at the WTO by states against a single state – Australia.[8]

Although the legal issues surrounding these disputes have been the subject of much discussion, the issues regarding compensation have not been addressed with the same enthusiasm. Compensation is only relevant for the investor-state matters as compensation in the WTO disputes would only be imposed if the panel were to rule and Australia were to fail to comply with the panel's recommendations and rulings.[9] Even then, compensation is considered voluntary and temporary.[10] In the investor-state matters, however, compensation is an issue. The fundamental principle of compensation in international arbitration was established in 1928 in the ***Chorzów Factory*** (***Chorzów***) case.[11] The 'essential principle'[12] identified in ***Chorzów*** was 'that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'[13] Although ***Chorzów*** dealt

with a physical asset, compensation for a matter involving an intellectual property asset would theoretically follow the same principle – 'but for' the act, the claimant would have been in a better situation financially than the one in which it actually found itself, and the difference between the but-for and actual situations is the amount of compensatory damages.

The methods used for valuing IP are similar to those used to value physical assets in many regards. The income, market and cost approaches are relevant whether the asset is tangible or intangible. Generally, the income approach focuses on the future stream of profits expected to be derived from the intangible asset and takes into account specific risk factors and a discount rate to arrive at value. Under the market approach, the valuation is based on transactions involving similar IP that are available for comparison. It is difficult to find transactions that are for comparable IP owing to the unique characteristics of many IP assets. Finally, under the cost approach, historic cost, replication cost or replacement cost measures would be used to establish value. In most circumstances involving IP, cost is unlikely to be representative of value.

This article will discuss the issues that have arisen in the WTO matters against Uruguay involving the trademarks of tobacco companies and the two investor-state matters involving Philip Morris. With respect to the latter, we will address some of the compensation issues that will likely arise, or that likely have arisen, given the mandate of ***Chorzów***.

Philip Morris V Uruguay14

On 19 February 2010, Philip Morris Switzerland and two related parties filed a request for arbitration against Uruguay in accordance with article 36 of the Convention on Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and article 10 of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of investments (the Switzerland–Uruguay BIT[15]). Philip Morris alleges that it has made investments in Uruguay including the establishment of manufacturing facilities and the registration of several trademarks.[16] Uruguay's anti-smoking legislation included measures that banned the sale of different presentations of the same brand of cigarette, a requirement that images warning about the risks of smoking cover at least 80 per cent of the cigarette pack, higher taxes, a ban on cigarette advertising in the media, and cigarette sponsorship of sporting events. In addition, smoking was banned in public places including offices, bars, restaurants, and dance halls. Philip Morris alleges that the ban on different presentations violates its right to use its trademarks – assets into which it has made investments. For instance, prior to the enactment of the new legislation Philip Morris sold Marlboro Red, Marlboro Gold, Marlboro Green and Marlboro Blue; however, in order to comply with the legislation it was only able to sell one variety (in this instance it chose to keep Marlboro Red).[17] In addition, Philip Morris claims that the requirement that 80 per cent of the cigarette pack be covered by graphic images means that its trademarks cannot be used in their proper form, and will be tarnished by their association with 'offensive images'.[18]

The measures that Uruguay has taken to curb tobacco consumption appear to be working. An article in ***The Lancet*** reports that between 2005 and 2011, Uruguay's annual per-person consumption of cigarettes decreased by 4.3 per cent and smoking prevalence decreased by 3.3 per cent.[19] Also, between 2005 and 2009, smoking prevalence among students decreased by an estimated 8 per cent per year. Since current smoking prevalence decreased by less than per-person consumption, the implication is that those who are still smoking are smoking less.

Numerous issues would have to be addressed when calculating compensatory damages given the allegations and circumstances in the Uruguay arbitration. For one, smoking was on the decline in Uruguay even before the more stringent regulations, which are the basis of the claim, were imposed. In addition, certain of the anti-smoking regulations likely led to decreased sales but are not being alleged by Philip Morris as violations. For instance, as discussed above, Uruguay instituted a ban on smoking in public places, banned cigarette advertising in the media and cigarette sponsorship of sporting events. Moreover, higher taxes will have led to decrease in sales, even with a relatively inelastic product such as cigarettes. In February of 2010, taxes were raised to 70 per cent of the price of a pack of cigarettes, although the effect appears to be further complicated by a simultaneous decrease in price.[20] Despite that complication, the above-mentioned ***Lancet*** article reports that between 2003 and 2010 the price of a pack of cigarettes increased by 88 per cent.[21] One recent study of own-price elasticity of demand in Latin America shows estimates to be between -0.43 per cent and -0.31 per cent.[22] This means that a 1 per cent increase in price will lead to a decrease in demand of between 0.31 per cent and 0.43 per cent. Therefore to the extent that the combined effect of the increase in taxes and the decrease in price has led to an increase in the price paid by the consumer, that increase in will have led to decreased sales not associated with any of the trademark issues. The effect of higher taxes, not only on cigarettes in general but on the Philip Morris brands specifically, would have to be addressed.

These measures, which do not appear to be being challenged by Philip Morris, have been shown to be cost-effective means by which to decrease tobacco consumption.[23] A report by the World Health Organization (WHO) states that '[s]tudies have shown that tobacco taxes are the most cost effective way to reduce tobacco consumption. Implementation of a package of price and non-price policies (eg, banning smoking in public places, banning advertising, etc) is also highly cost-effective.'[24] To the extent that these actions led to a decrease in cigarette sales, that decrease would not be included in compensatory damages owed to Philip Morris should they prevail on the merits. The decrease in cigarette sales attributable to the anti-smoking actions that are not being alleged by Philip Morris would have to be allocated out of the amount of compensatory damages. This exercise would be complicated by the simultaneity of the events. Moreover, if Philip Morris prevails on only certain of its merit claims (for instance, if the panel decides that the single presentation requirement is a violation but that the 80 per cent warning requirement is not) then an additional allocation analysis will have to be performed.

Contraband sales present another complication for the calculation of damages. To the extent that cigarettes were brought in illegally, but sold legally in another country, Philip Morris may have already benefitted from that sale. ***The Lancet*** article notes that there is no reliable data source for contraband sales, although it cites a 2006 Pan American Health Organization article that estimates that 7 per cent of total cigarette sales in Uruguay were contraband sales.

These are only some of the issues that would have to be addressed when calculating compensatory damages in the ***Philip Morris v Uruguay*** arbitration.

Philip Morris V Australia

In another matter brought by Philip Morris on 21 November 2011, Philip Morris Asia Limited filed a notice of arbitration against the Commonwealth of Australia for violations of the agreement between the government of Hong Kong and the government of Australia for

the Promotion and Protection of Investments (the Hong Kong-Australia BIT) and article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 2010 (the UNCITRAL Arbitration Rules). Philip Morris claims that it has made investments in Australia in its IP, which includes 'registered and unregistered trademarks; copyright works: registered and unregistered designs; and overall get up of the product packaging.'[25] Philip Morris claims that these investments have been expropriated under Australia's Tobacco Plain Packaging Act (TPP Act) and seeks compensation from Australia for its compliance with the TPP Act.[26] Among other measures, the TPP Act specifies where the brand name may appear on individual cigarettes (It may not), cigarette packs and cigarette cartons.[27] It also specifies the font, colour and capitalisation requirements for the brand and variety.[28]

There are numerous factors in the Australian case that will make the damages calculation interesting, some factors that are also found in the Uruguay matter and others that are unique to Australia. In addition to the TPP Act upon which Philip Morris bases its complaint, Australia has passed numerous other anti-smoking measures.[29] However, different states and territories have implemented different regulations, different exemptions, and, in some cases, different measures altogether. For instance, smoking in cars when a child under 16 years of age is present was banned in 2009 in New South Wales, but similar legislation did not take effect until 2012 in the Australian Capital Territory. The Australian Department of Health reports that since 1 December 2012, the day that the TPP Act took effect, there have been new rules governing the warnings on retail packaging. These new regulations include 14 new health warnings that are to be rotated annually, an increase in the size of the graphic health warning, and new information on the health effects of the chemicals in tobacco on the sides of cigarette packs and cartons.[30] In addition, two separate educational campaigns were funded starting in 2009 and 2010, respectively. In total over US$130 million is to be spent over a six-year period on the two campaigns that are aimed at both adults generally and certain sub-populations that are considered high risk or hard to reach.[31] Excise taxes on cigarettes have also increased in Australia in the recent past. In April 2010, a 25 per cent increase was implemented on tobacco products. Additional increases of 12.5 per cent each were announced and to be applied in December 2013 and then annually on 1 September for the next three years.[32] The Australian Department of Health cites a study done by the International Agency for Research on Cancer that concludes that increasing the price of tobacco products is one of the most effective measure that can be taken to reduce tobacco consumption as well as the health costs that are associated with it.[33]

As in Uruguay, because of the simultaneous nature of many of the measures with the TPP Act, the allocation of compensation to the accused act will have to be accomplished. Not all of the decrease in tobacco sales over the time period will be due to the TPP Act. Allocating damages among the various anti-smoking measures will be an exercise that will have to be undertaken and proven to the panel.

Ukraine, Honduras, Dominican Republic, Cuba And Indonesia V Australia

Not only has Philip Morris filed arbitration against Australia, but between 13 March 2012 and 20 September 2013, five states filed arbitrations at the WTO against Australia.[34] [35] The five complainant states are the Ukraine, Honduras, the Dominican Republic, Cuba and Indonesia. Third parties that joined the consultations in at least one of the disputes, if not more, include Argentina, Brazil, Canada, Chile, China, Nigeria, Cuba, El Salvador, the Dominican Republic, the European Union, Guatemala, Honduras, India, Japan, Korea, Malaysia, Mexico, Indonesia, Nicaragua, New Zealand, Norway, the Philippines, Russia, Singapore, Chinese

Taipei, Thailand, Turkey, Ukraine, United States, Uruguay, Saudi Arabia, South Africa and Zimbabwe.[36]

Similar to the UNCITRAL proceeding, the complaints in these matters involve challenges brought under, at least, the TRIPS Agreement, the Agreement on Technical Barriers to Trade (the TBT Agreement) and the General Agreement on Tariffs and Trade (GATT 1994). The five complainant countries have sizeable tobacco industries and allege, inter alia, that the Australian regulations are 'an unjustifiable encumbrance on the use of trademarks', 'prevent the normal exploitation and thus the enjoyment of the patent rights for tobacco products', constitute a barrier to trade that is in excess of what is necessary to achieve the health objectives of Australia.[37]

The WTO convened a panel for all five matters. On 10 October 2014 the panel informed the dispute settlement body that it expected to issue its final report to the parties not before the first half of 2016.

Smoking prevalence is on the decline worldwide, down to approximately 22 per cent, with the WHO reporting that
'[n]on-smoking is becoming the new norm worldwide.'[38] Neither Uruguay nor Australia would be among the largest markets for Philip Morris, but the cigarette maker is undoubtable aware of the value of its brand in generating sales. In the listing of most valuable brands for 2015, Philip Morris' Marlboro brand ranks 27th, valued at US$19.7 billion and up 13 per cent from the prior year.[39] The ICSID panel in the ***Uruguay*** case made it clear in its recent decision regarding the ability of the Pan American Health Organization to file an amicus brief that it is aware of the public interest aspects of the case and will be taking those interests into consideration. It remains to be seen whether any of the panels in the tobacco-related arbitrations will decide for the claimants on the merits of the trademark claims, and if the claimants do win on the merits, what compensation, if any, the panels will award.

Notes

1. Economics and Statistics Administration & United States Patent and Trademark Office, 'Intellectual Property And The U.S. Economy: Industries in Focus,' March 2012.
2. See Andrews, D and A de Serres (2012), 'Intangible Assets, Resource Allocation and Growth: A Framework for Analysis', OECD Economics Department Working Papers, No. 989, OECD Publishing. Corporate Reporting of Intangible Assets: A Progress Report.
3. See WTO | Dispute settlement – Index of disputes issues. 2015. [ONLINE]. The categories that fall under intellectual property include Copyright and Related Rights, Geographical Indications, Industrial Designs, Layout-Designs, Music in Bars, Omnibus Appropriations Act, section 211, Patents, Pharmaceuticals, Section 337, Sound Recordings, Trademarks, and Undisclosed Information.
4. See International Center for Settlement of Investment Disputes: ICSID > Cases. Listed are one pharmaceutical patent case, one trademark case and one case involving ship hull designs.
5. See Resources – ICANN. 2015. ICANN Uniform Domain-Name Dispute-Resolution [ONLINE].
6. See Circular 38a: International Copyright Relations of the United States. Although the Berne Convention prohibits the requirement of formal registration for copyrights,

statutory damages and attorneys' fees are only available in the US if the copyright is registered.

7. See Annex 1C – Agreement on Trade-Related Aspects of Intellectual Property Rights.
8. On 3 June 2015, it was reported that Ukraine had dropped its complaint. See Ukraine drops lawsuit against Australia over plain-packaging tobacco laws, WTO says – ABC News (Australian Broadcasting Corporation). 2015. [ONLINE]
9. Annex 2 of the WTO Agreement, article 22.
10. Annex 2 of the WTO Agreement, article 22.1.
11. *Factory at Chorzów (Ger. v Pol.*), 1928 P.C.I.J. (ser. A) No. 17 (13 September) (Judgment No. 13, Merits) (*Chorzów*).
12. *Chorzów*, p. 47.
13. *Chorzów*, p. 47.
14. We will refer to the claimants in these matters generally as 'Philip Morris.'
15. *Philip Morris Switzerland v Uruguay*, Request for Arbitration, 19 February 2010, at para. 1.
16. *Philip Morris Switzerland v Uruguay*, Request for Arbitration, 19 February 2010, at para. 64.
17. *Philip Morris Switzerland v Uruguay*, Request for Arbitration, 19 February 2010, at para. 44.
18. *Philip Morris Switzerland v Uruguay*, Request for Arbitration, 19 February 2010, at paras. 47 and 48.
19. Winston Abascal, Elba Esteves, Beatriz Goja, Franco González Mora, Ana Lorenzo, Amanda Sica, Patricia Triunfo, Jeffrey E Harris. 'Tobacco control campaign in Uruguay: a population-based trend analysis,'*The Lancet*, Vol 380, 3 November 2012.
20. See, eg Freakonomics 'How to Make People Quit Smoking: Full Transcript. [ONLINE]
21. Winston Abascal, Elba Esteves, Beatriz Goja, Franco González Mora, Ana Lorenzo, Amanda Sica, Patricia Triunfo, Jeffrey E Harris. 'Tobacco control campaign in Uruguay: a population-based trend analysis,' *The Lancet*, Vol 380, 3 November 2012, p. 1576.
22. Guindon, G E, Paraje, GR, & Chaloupka, F J (2015). The Impact of Prices and Taxes on the Use of Tobacco Products in Latin America and the Caribbean. *American Journal of Public Health*, 105(3), e9–e19. doi:10.2105/AJPH.2014.302396.
23. *WHO technical manual on tobacco tax administration*, Chapter IV: The political economy of tobacco taxation. World Health Organization 2010, ISBN 978 92 4 156399 4.
24. WHO technical manual on tobacco tax administration, Chapter IV: The political economy of tobacco taxation. World Health Organization 2010, ISBN 978 92 4 156399 4.
25. *Philip Morris Asia v Australia*, Notice of Arbitration, 21 November 2011, at para. 1.3.
26. *Philip Morris Asia v Australia*, Notice of Arbitration, 21 November 2011, at paras. 1.5 and 1.7.

27. See Australian government, Department of Health | Tobacco plain packaging – Your guide. 2015. [ONLINE]
28. See Australian government, Department of Health | Tobacco plain packaging – Your guide 2015. [ONLINE]
29. See Scollo, MM and Winstanley, ***MH. Tobacco in Australia: Facts and issues***. 4th edn. Melbourne: Cancer Council Victoria; 2012. 15.7 Legislation to ban smoking in public spaces.
30. See Australian government, Department of Health | Health warnings. 2015. Department of Health | Health warnings. [ONLINE]
31. See Australian government, Department of Health | Education. 2015. Department of Health | Education. [ONLINE]
32. See Australian government, Department of Health | Taxation. 2015. Department of Health | Taxation. [ONLINE]
33. See Australian government, Department of Health | Taxation. 2015. Department of Health | Taxation. [ONLINE]
34. Philip Morris has stated publicly that it is backing those opposing the Australian laws at the WTO (see Thompson, Christopher, 'Big Tobacco backs Australian law opposers,' ***Financial Times***, 29 April 2012).
35. WTO | Dispute settlement – Index of disputes by agreement cited. (18 June 2015).
36. WTO | dispute settlement – the disputes – DS435. [ONLINE]; WTO | dispute settlement – the disputes – DS467. [ONLINE]; WTO | dispute settlement – the disputes – DS458. 2015.
37. See, eg, Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packing, Request for Consultations by Ukraine, 15 March 2012, p. 3.
38. 'Tobacco use declining but major intensification needed in reduction and control efforts,' WHO Media Release, 18 March 2015 [ONLINE].
39. 'The World's Most Valuable Brands,' Forbes 2015 Listing [ONLINE].

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Investment Treaty Arbitration in the Americas

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Summary

DUAL NATIONALITY
DISQUALIFICATION
QUANTUM AND REVISION PROCEDURE UNDER ARTICLE 51 OF THE ICSID CONVENTION

Latin America continues to see vigorous activity in investment treaty arbitration. In 2014, 11 per cent of the 38 new investment arbitration cases registered under the ICSID Convention and Additional Facility Rules included a South American country as a party, while 8 per cent included Spanish-speaking countries from Central America.[1] Two cases were registered that involved Venezuela, while Argentina, Peru, Costa Rica, the Dominican Republic and Panama were each parties to one newly registered case.[2] 10 per cent of the arbitrators, conciliators and ad hoc committee members appointed in cases registered in 2014 were South American nationals (16 total), while 3 per cent are from Central America (four total).[3] At the opposite end of the arbitration 'life-cycle', the first seven months of 2015 also saw a number of cases involving Latin-American countries come to a close. Between 1 January 2015 and 31 July 2015, three ICSID awards were rendered in cases involving claims against Venezuela,[4] two awards were rendered in cases against Peru[5] and Perupetro,[6] and one award was rendered in an arbitration involving claims against Argentina.[7] The region continues to see an influx of foreign investment from all over the world, and there is no sense that this influx will cease or slow down in the coming years even as the commodity markets languish globally. This suggests that the region will continue to host investment treaty disputes for the foreseeable future.

While there were many interesting decisions and developments in the past year, the authors have chosen to highlight certain issues that may have a broader impact on the investment treaty dispute settlement system through a brief discussion of a selection of recent cases decided in the region. These issues, while seen in Latin American treaty arbitrations over the past year, are likely to be particularly important for arbitration practitioners, international investors and others interested in this field going forward.

First, ***García v Venezuela***[8] marks the first time that a tribunal relying on the UNCITRAL Rules has upheld jurisdiction over claims by dual nationals in an investment treaty dispute. The tribunal in ***García***, chaired by Eduardo Grebler of Brazil, held that two dual Spanish-Venezuelan nationals qualified as international investors under a strict textual reading of Spain and Venezuela's October 1997 bilateral investment treaty. Because the arbitration was governed by the UNCITRAL Rules, article 25[9] of the ICSID Convention's prohibition on claims filed by dual nationals was not applicable.

Second, Venezuela's recent attempt to disqualify two arbitrators pursuant to ICSID articles 14(1) and 57 of the ICSID Convention in ***ConocoPhillips v Venezuela***[10] indicates Venezuela's inclination to use article 57 requests in arbitral proceedings, as it seeks to defend itself against the myriad claims stemming from the various nationalisations that took place during the late president Hugo Chavez's administration. Given the broad latitude that parties have in making disqualification proposals (and the time-intensive inquiry that each proposal triggers), there is a strong possibility that article 57 requests will provide a powerful mechanism for Venezuela (and others) to challenge the legitimacy of investment arbitration proceedings going forward and some will view these challenges as unwarranted delay tactics.[11]

Finally, in ***Tidewater v Venezuela***, the tribunal not only provided guidance on the use of the DCF method for purposes of valuating an expropriated investment of a business that operated as a going concern, but also grappled with a revision application by Venezuela under article 51 of the ICSID Convention. This last step could be construed by some as a dilatory tactic aimed at resisting or at least postponing the enforcement of awards while

others will see it as a legitimate use of the revision procedure to ensure that correctness of the underlying award.

DUAL NATIONALITY

In ***García v Venezuela***, a tribunal for the first time upheld jurisdiction in an investment treaty dispute over claims brought by two Spanish-Venezuelan dual nationals.[12] The claimants brought claims against Venezuela under the bilateral investment treaty between Spain and Venezuela (BIT)[13] for breaches arising from the expropriation of their food distribution business and Venezuela's imposition of overly restrictive currency exchange restrictions.[14] This was possible, to a significant extent, because of claimants' choice of the UNCITRAL Rules to govern the proceedings.

It is well known that the ICSID Convention sets forth an express restriction on claims by dual nationals. Specifically, the Centre's jurisdiction extends to 'any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State',[15] but the definition of a national excludes 'any person who on either [the date of the parties' consent or the date the dispute is registered] also had the nationality of the Contracting State party to the dispute'.[16] The UNCITRAL Rules, however, do not contain such a restriction. In this context, the tribunal in García was left to determine whether or not the terms of the BIT precluded international investor claims by dual-citizens. Venezuela argued that the claimants' 'dominant and effective' nationality is Venezuelan under international law[17] and that allowing the case to go forward would violate principles of sovereign equality between states.[18] The tribunal rejected Venezuela's argument and noted that BITs 'constitute lex specialis between the parties'.[19] It thus found that the Vienna Convention mandates that the plain text of such agreements should prevail over interpretations that depend on secondary or supplemental sources of law, unless such an interpretation would lead to a 'manifestly unreasonable result'.[20] In looking at the BIT's text, the tribunal found that Venezuela entered into at least 27 BITs with foreign states between 1990 and 2008, and that these treaties did not consistently and uniformly prohibit jurisdiction over dual nationals.-[21] The tribunal determined that the omission of any prohibition of jurisdiction over dual nationals' claims in this particular treaty indicates that dual nationals can in fact file claims as international investors.[22] The tribunal also rejected Venezuela's claim that the claimants' Spanish nationality is 'merely formal,' noting that Spanish nationality is all that is required under a reading of the BIT's text in order to qualify for the treaty's protections.[23]

Looking forward, the tribunal's holding validates dual nationals' right to assert claims against a state of which it is a national, and paves the way for these dual nationals to pursue these claims under the UNCITRAL Rules and where the applicable BIT does not expressly exclude claims by dual nationals. More specifically, the tribunal's strict textual interpretation of the BIT could provide an 'opening' for claims under similar BITs that 'omit' references to dual nationality as a jurisdictional bar. In the Latin American context, it may have particularly significant implications because Spain imposes relatively relaxed residency requirements for citizens of Iberoamerican countries to attain Spanish nationality,[24] thereby making it relatively easy for many citizens of Latin American countries to acquire Spanish nationality in order to bring claims under a given BIT.

DISQUALIFICATION

The late president Hugo Chavez's high-profile nationalisations have led to a wide array of arbitrations against Venezuela. The majority of these arbitrations are now winding down

and, as such, Venezuela now faces a handful of awards condemning it to pay millions of dollars in damages. With a stagnant economy, Venezuela has persistently made use of what critics refer to as 'delay tactics' in international arbitration proceedings.[25] In what some may see as the latest manifestation of these 'tactics', Venezuela has attempted to disqualify a number of well-known arbitrators, including Alexis Mourre,[26] Yves Fortier[27] and Judge Kenneth Keith.[28] Others will view these disqualification requests as legitimate challenges to the investor–state dispute settlement system. As illustrated by the ***ConocoPhillips v Venezuela*** decision, it appears likely that Venezuela will continue to bring these challenges in the immediate future, as they may provide a particularly effective 'stall tactic' in ICSID proceedings even if they do not result in any actual disqualifications.

Challenges to specific arbitrators are generally based on arguments that the arbitrator cannot satisfy ICSID article 14(1)'s requirement that 'Persons designated to serve on [arbitration panels] shall be persons of high moral character and recognized competence [...] who may be relied upon to exercise independent judgment'.[29] ICSID article 57 allows parties to 'propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by [article 14(1)].'[30]

In ***ConocoPhillips***, the claimants initiated an ICSID arbitration in 2007 in order to recover compensation for three oil projects that Venezuela nationalised during the Chavez presidency. The arbitration panel consisted of Judge Kenneth Keith, a New Zealand national appointed president of the tribunal pursuant to article 38 of the ICSID Convention; Yves Fortier, a Canadian national appointed by ConocoPhillips; and Sir Ian Brownlie, a United Kingdom national appointed by Venezuela.[31] On 1 February 2010, after the death of Sir Ian Brownlie, Venezuela appointed Professor Georges Abi-Saab, an Egyptian national, as his replacement. On 5 October 2011, Venezuela proposed the disqualification of Mr Fortier following his disclosure that Norton Rose OR LLP, where Mr Fortier was a partner, proposed to merge with Macleod Dixon LLP, effective 1 January 2012.[32] On 18 October 2011, Mr Fortier informed the tribunal and the parties that he was resigning from Norton Rose to establish his own arbitration practice. Judge Keith and Professor Abi-Saab then rejected the first proposal for disqualification in February 2012.[33]

After the Tribunal issued a majority decision finding Venezuela in breach of its international obligation to negotiate compensation in good faith for its taking of ConocoPhillips' assets, Venezuela submitted a second request for disqualification of Mr Fortier, along with a proposal for the disqualification of Judge Keith, in 11 March 2014. ICSID Administrative Council Chairman Jim Yong Kim rejected it in May 2014.[34] However, Venezuela continued to press for Mr Fortier's disqualification in February 2015, pointing to two articles published in ***Global Arbitration Review*** in January 2015 that highlighted the participation of a Norton Rose partner as the tribunal assistant in the ***Yukos v Russian Federation*** arbitrations – presided over by Mr Fortier.[35] Venezuela's appointed arbitrator, Professor Abi-Saab, who dissented from the majority decision on the merits, did not submit his dissenting opinion until 19 February 2015; he then submitted his resignation on 20 February 2014, with the motion to disqualify Mr Fortier still pending, and a damages hearing scheduled for 13 April 2015.[36] In March 2015, the secretary of the Tribunal informed the parties that Judge Keith and Mr Fortier had decided not to consent to Professor Abi-Saab's resignation, and that the chairman of the Administrative Council would appoint a replacement pursuant to ICSID Convention article 56(3)[37] and ICSID Arbitration Rule 11(2)(a).[38]

In the wake of the resignation decision, Venezuela applied to disqualify Judge Keith and Mr Fortier, asserting that they lacked the independence and impartiality required by ICSID Convention article 14(1).[39] Venezuela argued that the two arbitrators' treatment of Professor Abi-Saab's resignation revealed a 'negative attitude' toward Venezuela[40] that rendered them unqualified under article 14(1), and separately reiterated their argument that Mr Fortier had an ongoing relationship with Norton Rose that required his disqualification. Here, the Administrative Council rejected Venezuela's request, noting that:

- a 'difference of views' between Venezuela and Judge Keith and Mr. Fortier regarding the appropriate 'procedure and [...] circumstances that would warrant a refusal to consent to [an arbitrator's] resignation [...] does not demonstrate apparent or actual bias on the part of Judge Keith or Mr Fortier;'[41]
- evidence of 'profound disagreement among the Tribunal on points of law and assessment of evidence' provided by the text of Professor Abi-Saab's dissent 'is not proof that Judge Keith and Mr Fortier harboured a general negative attitude toward Venezuela;'[42] and
- Venezuela provided insufficient evidence of any 'ongoing relationship' between Norton Rose and Mr Fortier to call his independence and impartiality into question.[43]

The decision in ***ConocoPhillips*** is perhaps not particularly notable from a precedent-setting or 'points-of-law' perspective. It appears hard to argue with the panel's conclusions as disagreement among a panel is perfectly foreseeable, and the mere presence of a dissent – even a vigorous or impassioned one – should not indicate the sort of 'manifest' bias that will lead to a disqualification. Similarly, disagreement between a party and a tribunal over proper procedures to be followed during the proceeding is not surprising, as evidenced the mechanism set forth in the ICSID Convention for having a higher authority to rule on such disagreements. Finally, if physical proximity between an arbitrator's offices and his former employer were relevant to a determination of independence and impartiality under article 14(1), surely there would be very few arbitrators left in New York, London, Paris or other major cities.

Instead, what some may find interesting about ***ConocoPhillips*** is how it may illustrate Venezuela's use of article 57 as a means to delay enforcement of arbitration awards.[44] Again, others will not view it this way and instead will view such challenges as a proper tool afforded to parties in the investment treaty dispute context to ensure that their decision-makers are impartial and independent. But it is notable that as the Venezuelan economy continues to struggle, the country has repeatedly opposed enforcement in recent proceedings by, for example, petitioning for revisions under ICSID Convention article 51,[45] requesting annulments under article 52[46] and applying for stays of enforcement in the courts.[47] Like these other mechanisms, there is a substantial risk that Venezuela and other similarly inclined parties will use article 57's disqualification provisions as a means to delay the proceedings and, ultimately, enforcement of awards.[48] Where a party seeks disqualification of the majority of the tribunal, as Venezuela sought in ***ConocoPhillips***, this risk is particularly acute because such proposals must be evaluated by the chairman of the Administrative Council[49] – who will likely require explanations from the challenged arbitrators. Importantly, ICSID Arbitration Rule 9(6) requires that 'The proceeding shall be suspended until a decision has been taken on the proposal',[50] which all but guarantees delay. This is particularly burdensome in an arbitration like ***ConocoPhillips***, where Venezuela submitted three separate disqualification requests from 2011 to 2015, with each requiring

'explanations' from the challenged arbitrators (two of which were requests to disqualify a majority of the tribunal that required a decision by the chairman).

In fact, as international arbitration claims increase, such challenges may become increasingly effective because of the relatively small pool of individuals who preside over these proceedings, and their repeat appointments in proceedings before ICSID.[51] Although Venezuela's 'proximity' argument is unlikely to ever merit disqualification, assertions of lack of independence based on professional associations – like those Venezuela made regarding Mr Fortier's work with a Norton Rose partner in the earlier ***Yukos v Russian Federation*** proceedings – may begin to gain traction as 'interconnections' between arbitrators, interested parties and counsel appearing before them increase. As the tribunal noted in ***ConocoPhillips***, articles 57 and 14(1) 'do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias'.[52] Thus, a sufficient showing of an 'association' between an individual arbitrator and some interested party could be sufficient to require further investigation. As a result, even if there is not enough to actually merit disqualification, increased 'interconnections' between arbitrators, interested parties and counsel may allow Venezuela and others to make colourable article 57 claims that will take up ICSID resources and substantially delay arbitration proceedings.

QUANTUM AND REVISION PROCEDURE UNDER ARTICLE 51 OF THE ICSID CONVENTION

Another case involving Venezuela made headlines twice in 2015. The first time dealt with the damages award in ***Tidewater v Venezuela***,[53] in which the tribunal, following its determination that Venezuela had expropriated the claimants' property, provided a nuanced approach to the DCF valuation method. The second dealt with Venezuela's subsequent (but unsuccessful) attempts to revise the Tidewater Award under the revision procedure set forth in article 51 of the ICSID Convention. Venezuela's attempts to have the ***Tidewater*** award revised under article 51 of the ICSID Convention could also be construed by some observers as a misuse of the revision procedure employed by Venezuela to delay enforcement of arbitration awards against it. Still others will view such a challenge as a valid exercise of the ICSID revision procedure to ensure the accuracy and correctness of the underlying award. Under any view, too many of such applications could undermine the legitimacy of the investment state dispute settlement system, especially in the eyes of those looking for reasons to attack or challenge it.

Tidewater's Approach To DCF

In ***Tidewater***, the tribunal[54] found that Venezuela had expropriated claimants' investment in its Venezuelan subsidiary and that this expropriation, although lawful, was done without payment of prompt, adequate and effective compensation.[55] Since the expropriation was lawful, the tribunal reasoned that the standard for compensation was that set forth in the Treaty, which is based on 'the market value of the investment expropriated immediately before the expropriation'.[56] The tribunal further determined that the World Bank Guidelines were useful for purposes of determining the standard of compensation in cases of lawful expropriation.[57] These Guidelines, explained the tribunal, provide a distinction between businesses that are a going concern with a record of profitability and those that are not.

Within this framework, the tribunal found that the DCF method was the most appropriate valuation method for determining the value of a business that operated as a going concern before the expropriation took place.[58] In the Tribunal's view, the claimants' investment was a going concern because it had been operating successfully in Venezuela for over 50 years

and, in the five years prior to Venezuela's taking, had documented substantial income.[59] As a result, the tribunal determined that it was 'not appropriate to determine the fair market value by reference to either the liquidation value of the assets [...], or the book value of those assets'.[60] The tribunal also rejected valuation methods based on comparable transactions and comparable business models.[61]

The tribunal's reliance on the DCF method to the exclusion of others is noteworthy for several reasons. First, the tribunal concluded that it had to look to the particular facts pertaining to the claimants' business and that it had to make its determination on compensation based on the evidence on the record.[62] Second, taking into account the considerable differences in the valuation approach in the experts' reports, the tribunal had to make its own findings on compensation looking at specific drivers used by the experts in their reports.[63] The tribunal's approach to compensation illustrates the tribunal's independence from the parties' and their experts' submissions on quantum in making its determination, albeit while using those submissions as analytical guideposts.

The tribunal identified six variables that had an instrumental role in valuing the claimants' investment: scope of business; accounts receivable; historical cash-flow; equity risk; country risk; and business risk. Although these drivers were analysed within the context of the fact-specific issues in ***Tidewater***, they are worth mentioning because they serve as benchmarks and indicators for arbitrators to analyse, independently of the parties' submissions, the fair market valuation of a going concern business under the DCF method. These variables also provide helpful insight into what likely is the approach that many tribunal's take to the issue of quantum, even if they do not set it out explicitly in their awards.

Of these six drivers, three are noteworthy. Regarding the second variable, accounts receivable, the tribunal determined that claimants' expropriation was comprehensive, to the extent that Venezuela assumed control of claimants' business and all of its assets.[64] Therefore, the value of the lost investment must include outstanding accounts receivable, particularly since a potential buyer would take accounts receivable into consideration in the acquisition of a business. As to the fifth variable, country risk premium, the tribunal found that Venezuela is one of the highest risk countries for investment purposes and, as such, country risk is a factor a potential buyer is likely to consider before investing there.[65] After looking at other tribunals with fixed high-risk premiums on Venezuela, even up to 18 per cent, the tribunal found that a 14.75 per cent risk premium for Venezuela 'represents a reasonable, indeed conservative, premium'.[66] Finally, as regards the sixth driver, business risk, the tribunal did not accept Venezuela's expert's argument that claimants' reliance on a single customer, the large state-owned company PDVSA, amounted to a significant business risk because PDVSA was a significant and steady client and it was not foreseeable that PDVSA would terminate its business relationship with claimants' subsidiary in Venezuela.

After considering the parties' disparate calculations, the tribunal reasoned that it had to reach its own conclusion on compensation and that the appropriate estimation of compensation consists of the value that a potential buyer would pay for the business, as well as any amounts owed to the business (accounts receivable). The tribunal, therefore, arrived at a compensation value of US$46.4 million (US$30 million as the value of the business plus US$16.4 million for accounts receivable). This figure departed significantly from the parties' figures and would be the subject of revision proceedings, as elaborated in greater detail below.

The ***Tidewater*** award thus adds to the development of investment treaty law by providing guidelines that a future tribunal could take into account when employing the DCF method in its quantum determination in the face of a business that operated as a going concern prior to the state's expropriation. Importantly, the ***Tidewater*** award provides a glimpse into a tribunal's independent quantum analysis in the face of severely disparate valuations by the parties and their experts, an approach that likely many tribunals adopt, even if not expressly.

Venezuela's Attempt To Revise The Tidewater Award

Article 51 of the ICSID Convention provides a mechanism for a party to seek revision of an award under quite exceptional circumstances. Pursuant to article 51(1), a request for revision is only warranted when there is a 'discovery of some fact of such nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and the applicant's ignorance of that fact was not due to negligence'.[67] As the tribunal in ***Tidewater*** succinctly stated, the test for revision contains three prongs:

- a fact has been discovered;
- said fact is of such a nature as to decisively affect the award; and
- said fact was unknown to the Tribunal and to the applicant when the award was rendered.[68]

The ***Tidewater*** tribunal also indicated that the applicant must establish all three prongs in order to prevail in its request for revision.

Shortly after the ***Tidewater*** award, Venezuela lodged a request for revision under article 51 of the ICSID Convention. According to Venezuela, there was an error in the tribunal's damages calculation that merited the revision.[69] Venezuela pointed out that the claimants' actual figure in its expert report was not US$31.959 million, as the tribunal noted at paragraph 201 of the ***Tidewater*** award, but US$13.917 million.[70] According to Venezuela, this calculation coloured the tribunal's approach to its estimation on compensation, leading it to adopt a value of claimant's business at approximately US$30 million. Venezuela argued that this involved the discovery of a fact that decisively affected the award. The claimants, in turn, rejected Venezuela's request, arguing that the correct procedure for addressing this issue is an application for rectification under article 49 of the ICSID Convention. According to the claimants, this amounted to a clerical error in the transcription of the ***Tidewater*** award.

The tribunal, composed of the same members,[71] sided with the claimants. As an initial matter, the tribunal noted that Venezuela's application was based on 'a clerical error in [the] transcription [of the award]'.[72] The tribunal reasoned that paragraph 201 of the ***Tidewater*** award was a mere recapitulation of the parties' positions and not indicative of the tribunal's reasoning regarding compensation. As the tribunal pointed out in the ***Tidewater*** award, it had reached its own conclusion on compensation based on the evidence on the record.

More importantly, however, the Tribunal held that Venezuela had failed to establish the existence of a new fact that would warrant revision under article 51.[73] The tribunal found that the fact adduced by Venezuela was not new or was not discovered after the award was rendered.[74] Quite the contrary, the claimants' figure was contained in the documents submitted by the expert. The tribunal thus determined that Venezuela had failed to establish the first prong in the test for admitting a request for revision under article 51. In any event, the tribunal also noted that Venezuela did not point to any authority in support of its argument

that a transcription error is equivalent to a new fact subject to revision under article 51 of the ICSID Convention.

Even though it had no obligation to do so, as Venezuela had failed to establish the first prong of the revision test, the tribunal nevertheless found that Venezuela's request did not satisfy the second prong because the clerical error did not decisively affect the award. As previously indicated, the parties' quantum experts had adopted considerably divergent approaches to valuation and had arrived at vastly disparate figures, prompting the tribunal to make its own determination on quantum. This determination was based on all the evidence of record and took into account the correct figures submitted by the parties.

The ***Tidewater*** Decision on Revision ultimately underscores that, while parties may misuse or misapply the ICSID Convention's valuable procedures for revision of awards, tribunals have a seminal role to play in avoiding perversion of those mechanisms. The Tidewater tribunal's thorough Decision on Revision – even on a set of circumstances that would appear clear to any reasonable observer – illustrates how important it is for arbitrators to substantiate and explain their findings and reasoning on these types of requests, so as to ensure that their decisions stay true to the object and purpose of those tools. To the extent arbitral tribunals issue carefully reasoned and detailed decisions setting out the precise standards that parties must meet in order to obtain the relief requested, other actors will find it harder to justify filing requests and applications whose aim – while perhaps legitimate from the perspective of the applicant – end up perhaps undermining the legitimacy of the investment treaty dispute settlement system.

Notes

* Quinn Emanuel summer associate, Carl Spilly, also contributed to this submission.

1. ICSID Caseload Statistics Issue 2015-1, ICSID at 24 (2015).
2. Id. at 25.
3. Id. at 31.
4. See ***Venoklim Holding BV v Venezuela***, ICSID Case No. ARB/12/22 (Award, 3 April 2015); ***Tidewater Inc, et al v Venezuela***, ICSID Case No. ARB/10/5 (Award, 13 March 2015);***OI European Group BV v Venezuela***, ICSID Case No. ARB/11/25 (Award, 10 March 2015).
5. See ***Levy v Peru***, ICSID Case No. ARB/11/17 (Award, 9 January 2015).
6. ***Pluspetrol Perú Corporation, et al v Perupetro SA***, ICSID Case No. ARB/12/28 (Award, 21 May 2015).
7. ***Suez v Argentina***, Case No. ARB/03/17 (Award, ***9 April 2015***).
8. Decision on Jurisdiction, Case CPA No. 2013-3 (15 December 2014) (Spanish-language version only).
9. Id.
10. ***ConocoPhillips v Venezuela***, ICSID Case No. ABR/07/30 at para 28 (Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015).
11. This practice is by no means unique to Venezuela. For example, Argentina too sought the disqualification of a majority of the Tribunal in ***Ablacat and Others v Argentine Republic***, ICSID Case No. ARB/07/5 (Decision on the Proposal to Disqualify A Majority of the Tribunal, 4 February 2014). The Argentine Republic sought disqualification on

the basis that Professors Tercier and van den Berg lacked the qualities required by Article 14(1) of the ICSID Convention (high moral character, recognised competence in the fields of law and independent judgment). Specifically, the Argentine Republic argued that the procedural order regarding the timetable for filing deadlines lacked equality in treatment to the detriment of Argentina's defense and, as such, Professors Tercier and van den Berg lacked independent judgment. In a decision also chaired by Dr Jim Yong Kim (see ***ConocoPhillips*** below), the Chairman of the Administrative Council rejected the Argentine Republic's efforts to disqualify Professors Tercier and van den Berg because 'the existence of an adverse ruling is insufficient to prove a manifest lack impartiality and independence,' particularly when the procedural ruling in question was reasoned and adopted after consultation with the parties.

12. Decision on Jurisdiction, Case CPA No. 2013-3 (15 December 2014) (Professor Eduardo Grebler, et al, arbs) (Spanish-language version only).
13. Recuerdo Entre el Reino de España y la República de Venezuela para la Promoción y Protección Recíproca de Inversiones. Ven-Esp, (18 October 1997) (Spanish-language version only).
14. García, Case CPA No. 2013-3 at para 3-4.
15. ICSID Convention article 25(1).
16. ICSID Convention article 25(2).
17. García, Case CPA No. 2013-3 at para 116.
18. Id. at para 184.
19. Id. at para 158.
20. Id. at para 161-66.
21. Id. at para 178-180.
22. Id.
23. García, at para 200.
24. Citizens of Iberoamerican countries are eligible to become Spanish citizens after residing in Spain for only two years.
25. See, eg, ***ConocoPhillips v Venezuela***, Decision on the Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ABR/07/30 at para 28 (1 July 2015) ('The Claimants allege that [Venezuela's] [p]roposal is patently frivolous and that it is part of a series of meritless and desperate delaying tactics by Venezuela.').
26. See ***Fábrica de Vidrios Los Andes, CA v Venezuela***, Decision on the Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ARB/12/21 (16 June 2015) (Dr Jim Yong Kim, chairman).
27. See ***ConocoPhillips v Venezuela***, Decision on the Proposal to Disqualify a Majority of the Tribunal, ICSID Case No. ABR/07/30 (1 July 2015) (Dr Jim Yong Kim, chairman).
28. Id.
29. ICSID Convention article 14(1).
30. ICSID article 57.
31. ConocoPhillips, ICSID Case No. ABR/07/30 at para 4.

32. Id. at para 5.
33. Id. at para 6.
34. Id. at para 10.
35. Id. at para 12.
36. Id. at para 16-24.
37. Id. at para 25.
38. Id. at para 26.
39. Id. at para 36-37.
40. Id. at para 85.
41. Id. at para 90.
42. Id. at para 91.
43. See, eg, Id. at para 96 (finding that, inter alia, the 'physical proximity of Mr Fortier's office with Norton Rose offices in Montreal [...] is irrelevant to determining Mr Fortier's independence and impartiality').
44. For a general overview of possible limits on enforcement of ICSID arbitration awards, see Edward Baldwin, et al, 'Limits to Enforcement of ICSID Awards'. 23 J. INT. ARB. 1–24 (2006).
45. See, eg, ***Venezuela Holdings, BV, et al v Venezuela***, Decision on Revision, ICSID Case No. ARB/07/27 (12 June 2015) (Gabrielle Kaufmann-Kohler and Dr Ahmed Sadek El-Kosheri, arbs) (denying Venezuela's request for revision of award pursuant to article 51).
46. See, eg, Richard Woolley, 'Venezuela Seeks to Annul Award Over Caribbean Airport', ***Global Arbitration Review*** (24 March 2015) https://globalarbitrationreview.com/news/article/33665/venezuela-seeks-annul-award-caribbean-airport/ (last visited 28 July 2015).
47. See, eg, République Bolivarienne du Venezuela c/ Société Gold Reserve INC, Cour d'appel de Paris, Pôle 1 – Chambre 1, RG No. 14/21103 (29 January 2015) (denying Venezuela's request to set aside US$715 million arbitration award on international public policy grounds).
48. See generally, Karel Daele, 'Challenge and Disqualification of Arbitrators in International Arbitration 66' (2011) (discussing the use of disqualification petitions as a delay tactic in international arbitration proceedings).
49. ICSID Arbitration Rule 9(4).
50. ICSID Arbitration Rule 9(6).
51. Daphne Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators', 96 CORNELL L. REV. 73 (2011) (noting that, for 'concluded cases' before the ICSID from 1994-2009, '[a] total of 175 arbitrators were appointed in [...] 131 cases [...and] of these 175 arbitrators, 26 were appointed at least four times, 18 were appointed three times, 24 were appointed twice, and 107 were appointed once [...and] at least one [arbitrator appointed in four cases] was present in 105 of the 131 concluded cases').

52. ***ConocoPhillips***, ICSID Case No. ARB/07/30 at para 83 (citations omitted).
53. ***Tidewater Investments SRL and Tidewater Caribe, CA v the Bolivarian Republic of Venezuela***, ICSID Case No. ARB/10/5 (Award, 13 March 2015).
54. Composed of Campbell McLachlan (President), Andrés Rigo Sureda, and Brigitte Stern.
55. Tidewater, at para 146.
56. Id. at para 151.
57. Id. at para 152.
58. Id. at para 156 ('In the field of investment treat law, tribunals have frequently found the discounted cash flow (DCF) method to provide the most useful method for arriving at a valuation of a business that had been operating as a going concern prior to the taking.')
59. Id. at para 165.
60. Id. at para 165.
61. Id. at para 166.
62. Id. at paras 164, 167.
63. Id. at para 168.
64. ***Tidewater***, at para 175.
65. Id. at para 186.
66. Id. at para 190.
67. ICSID Convention, article 51(1).
68. ***The Bolivarian Republic of Venezuela v Tidewater Investment SRL and Tidewater Caribe, CA***, ICSID Case No. ARB/10/5 (Decision on Application for Revision, July 7, 2015), at para 25.
69. Tidewater Decision on Revision, at para 15.
70. Id. at para 16(e).
71. Campbell McLachlan (President), Andrés Rigo Sureda and Brigitte Stern.
72. Id. at para 29.
73. Id. at para 36.
74. Id. at para 37.
75. Id. at para 34.

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Summary

LEGISLATIVE TECHNIQUE
THE CONTRACT OF ARBITRATION
CONCLUSIONS

On 1 August 2015, the new Civil and Commercial Code (CCC) became effective. It was enacted by the Federal Congress in 2014 through Law 26,994. In addition to unifying the provisions of the Civil and Commercial Codes that governed Argentine legal life since 1871 and 1890 respectively, the CCC incorporates numerous innovations, including a section devoted to the 'contract of arbitration'.

LEGISLATIVE TECHNIQUE

The rationale for including the 'contract of arbitration' in the CCC derives from the political organisation of Argentina and the mixed legal nature of arbitration.

Political Organisation Of Argentina

Argentina is a federal republic consisting of 23 provinces and the autonomous city of Buenos Aires, which is the federal capital. The Federal Constitution establishes in article 121 that provinces reserve all powers not delegated to the federal government. Additionally, article 75(12) thereof states that the Federal Congress is empowered to enact the civil, commercial, criminal, mining, labour and social security codes, in unified or separate bodies, provided that such codes do not alter local jurisdictions.

Due to the fact that the power to enact procedural codes has not been delegated to the Federal Congress by article 75(12) of the Constitution, the provinces maintain the exclusive right to enact those codes in their respective jurisdictions. Consequently, each province has enacted its own procedural code, and the Federal Congress has enacted a Federal Procedural Code that is only applied by federal courts and courts in the autonomous city of Buenos Aires.

Mixed Legal Nature Of Arbitration

Procedural codes in Argentina normally regulate arbitration. This is because, originally, arbitration was conceived as a 'special procedure'. The problem with this approach is that procedural codes naturally focus on the procedural aspects of arbitration, but neglect the treatment of other aspects that are equally important. One of those aspects is the regulation of the arbitration agreement.[1]

The Federal Procedural Code, for example, establishes that, despite the existence of an arbitration clause, parties need to conclude a compromise after the dispute has arisen. This provision is outdated and is inconsistent with international treaties ratified by Argentina. Moreover, this requirement is generally considered to be overridden by the parties' consent when, for example, they agree to an institutional arbitration that is governed by its own rules or when they otherwise agree in the arbitration clause waiving such a condition.[2]

Nowadays, it is universally accepted that the legal nature of arbitration is neither jurisdictional nor contractual, but a blend of both of them. The Federal Supreme Court of Argentina has also recognised this.[3] Modern laws on arbitration, whatever the way in which they are instrumented, equally regulate the 'contract of arbitration' and the procedural aspects of arbitration.

The Rationale Of The Legislative Technique

The mixed legal nature of arbitration requires, according to the political organisation of Argentina, that civil and commercial matters embodied in the 'contract of arbitration' be regulated in a uniform manner for all the country by the Federal Congress, and that

procedural matters of arbitration be regulated by Provincial Legislatures in their respective jurisdictions and by the Federal Congress in relation to federal territories, such as the autonomous city of Buenos Aires.

To avoid this double-regulation of arbitration and unify federal and provincial laws, the Federal Congress could have passed a federal law on arbitration and invited the provinces to adhere to it. Several bills proposed this solution in recent years, but none of them succeeded in obtaining congressional approval. Therefore, it was decided to take advantage of the unification of the civil and commercial codes to include a modern regulation of arbitration agreements and thereby remedy the deficiencies of the procedural codes on this matter.

Thus, as of 1 August 2015, arbitration has a double-regulation: the 'contract of arbitration' is governed by the CCC, and the procedural matters of arbitration are governed by the relevant procedural codes. The problem with this approach is that some of the provisions of the CCC contradict the provisions of the procedural codes, or regulate some matters that are arguably procedural. This may give rise to discussions on the procedural nature of those provisions, and on whether they are unconstitutional because the Federal Congress is not empowered to regulate procedural matters.

Unity Or Duality Of Rules Governing The Arbitration Agreement?

Procedural codes generally make no distinction between domestic and international arbitration. Although the CCC contains a section on Private International Law for international cases, it does not establish special rules for international arbitration.

It only provides, in article 2605, that, in economic and international matters, the parties are entitled to defer jurisdiction in favour of judges or arbitrators outside of the Republic of Argentina, unless Argentine judges have exclusive jurisdiction or choice of forum agreements is prohibited by law.

Although the CCC does not regulate the arbitration agreement in the private international law section, it has been interpreted that, by reason of specialty, reference should be made to provisions of the CCC relating to the 'contract of arbitration'.[4]

THE CONTRACT OF ARBITRATION

The CCC contains a number of rules that are beneficial for arbitration and that are in line with modern legislations. Its provisions were inspired by the Civil Code of Quebec, the UNCITRAL Model Law and the French Code of Civil Procedure. However, certain last-minute changes have created some smudges that have to be cleaned up by case law and scholars for arbitration to function properly.

Definition

Article 1649 of the CCC defines the 'contract of arbitration' as an agreement whereby the parties undertake to submit to one or more arbitrators all or any disputes that have arisen or may arise between them in respect of a defined legal relationship of private law, whether contractual or not, in which public policy is not compromised.

The limitation to relationships of private law is related to the last paragraph of article 1651 of the CCC, whereby disputes with the federal or provincial states are not governed by the rules that apply to the 'contract of arbitration'.

The limitation related to public policy can lead to controversy if it is not properly interpreted. In line with case law preceding the CCC, it has been concluded that the fact that a particular matter is regulated by public policy rules does not imply that such matter cannot be submitted to arbitration because the arbitrability of a matter is not determined by the rules applicable to the merits of the case, but by the law applicable to the arbitration agreement.[5] Argentine courts have recognised that the fact that the merits of a dispute are governed by rules that are deemed to constitute public policy does not mean that the matter is not arbitrable to the extent it relates to monetary rights of the parties.[6]

Form

Article 1650 of the CCC establishes that the arbitration agreement must be in writing and may consist of an arbitration clause or a compromis. Unlike some procedural codes, the CCC does not require the conclusion of a compromis after the dispute has arisen, when the parties had already included an arbitration clause in their contract.

It also provides that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Arbitrability

According to article 1651 of the CCC, the following matters are 'excluded' from the arbitration agreement: civil status or capacity of persons; family issues; rights of users and consumers; adhesion contracts; and labour relations. Consumer and labour disputes are excluded from the 'contract of arbitration' regulated in the CCC because the arbitrability of those matters is governed by specific laws.

The CCC provisions concerning the 'contract of arbitration' do not apply to disputes with the federal or provincial states. This is consistent with article 1649 thereof in the sense that only private law matters can be submitted to arbitration.

Arbitration In Law And In Equity

Article 1652 of the CCC establishes that disputes can be submitted to arbitration in law or arbitration ex aequo et bono. If nothing is stipulated in the arbitration agreement, or if the parties do not expressly authorise the arbitrators to decide the dispute in equity, it is deemed that the parties decided to submit their dispute to arbitration in law.

This provision contradicts the solution established by different procedural codes. Pursuant to several procedural codes, unless it is otherwise agreed, it is deemed that the parties decided to submit their dispute to arbitration ex aequo et bono.

Separability

Article 1653 of the CCC provides that the arbitration agreement is independent of the contract to which it relates. Therefore, the invalidity of a contract does not necessarily determine the invalidity of the arbitration agreement, and the arbitrators remain competent to resolve the dispute.

Competence

Article 1654 of the CCC sets forth that, unless otherwise agreed, the arbitration agreement confers on arbitrators the power to decide on their own competence, including preliminary

objections with respect to the existence or validity of the arbitration agreements or any other matter that could prevent arbitrators from settling the dispute.

Preliminary Measures

Article 1655 of the CCC establishes that, unless otherwise agreed, the arbitration agreement confers on arbitrators the power to adopt, at the request of any party, the precautionary measures they deem necessary regarding the subject of the dispute. The arbitrators may require adequate security from the applicant. Only courts have the authority to enforce those measures.

The application of a party to a court for such measures shall not be deemed to constitute an infringement or a waiver of the arbitration agreement, and shall not affect the authority reserved for the arbitrators.

Preliminary measures requested by the arbitrators may be challenged in court if they violate constitutional rights or are unreasonable.

Effects Of Arbitration Agreements And Review Of Awards

According to 1656 of the CCC, the arbitration agreement obliges the parties to honour its terms and excludes the competence of the courts in disputes submitted to arbitration, unless the arbitral tribunal is not yet hearing the case and the arbitration agreement appears to be manifestly void or inapplicable. In case of doubt, the most favourable interpretation for the efficiency of the arbitration agreement should prevail.

The last paragraph of article 1656 is the most problematic. It states that final arbitral awards may be reviewed before the competent courts when grounds for total or partial annulment are invoked, pursuant to the provisions of 'this Code'. It also provides that the parties cannot waive their right to 'challenge' the final award that is 'contrary to law'.

This paragraph presents at least three problems. First, it refers to grounds of annulment that are invoked pursuant to the provisions of 'this Code', when the CCC does not contemplate any grounds for annulment of arbitration awards. The intent was possibly to refer to the procedural codes that could apply to the case, which do establish specific causes for annulment of arbitral awards.

Second, it refers to the inability of waiving the right to 'challenge' the final award, without specifying whether it refers to the inability to waive the right to appeal the award or the right to vacate the award. The procedural codes in general provide that the parties may waive their right to appeal the award, but cannot waive their right to vacate the award on the grounds provided thereby. Some international treaties ratified by Argentina establish that the only remedy against the award is the petition for annulment.[7] Therefore, consistent with those procedural codes and international treaties, article 1656 of the CCC may be interpreted to refer to the inability of waiving the right to vacate the award.

Third, said article 1656 refers to the challenge of final awards that are 'contrary to law', which is a very broad concept. If, as explained above, the CCC were interpreted in the sense that it refers to the inability of waiving the right to vacate an award on grounds of annulment, and not to the right to appeal the award, then it could be interpreted that the CCC refers to procedural law that is applicable to the case, which would normally be that of the seat of the arbitration. That is, the parties cannot waive their right to vacate an award that it is invalid because it does not meet the validity requirements established by applicable procedural law.

The opposite interpretation, this is, that a final award may be challenged on grounds of its alleged inconsistency with any legal provision, would not only be inconsistent with several international treaties and the sources of inspiration of the arbitration chapter of the CCC, but moreover with the main purpose of arbitration to displace disputes from the competence of the judicial courts, except for their review of final awards based on specific causes of annulment.

Institutional Arbitration

Article 1657 of the CCC establishes that the parties may entrust the administration of the arbitration and the appointment of arbitrators to civil associations or other institutions, whether national or foreign, that are statutorily authorised to exercise that function. The arbitration rules of these entities govern the arbitral procedure and integrate the arbitration agreement.

Optional Clauses

Article 1658 of the CCC provides that parties can agree on:
(i) the seat of arbitration; (ii) the language of the arbitration; (iii) the arbitration procedure (if there is no agreement, the arbitral tribunal may conduct the arbitration in the manner it deems appropriate); (iv) the time limit within which the award must be rendered (if there is no agreement, the time limit will be governed by the arbitration rules of the arbitral institution, and, failing that, by the law of the seat); (v) the confidentiality of the arbitration; and (vi) the distribution of the arbitration costs.

Appointment Of Arbitrators

According to article 1659 of the CCC, the arbitral tribunal shall be composed of one or more arbitrators of an odd number. If nothing is stipulated, the arbitrators shall be three. The parties may freely agree on the procedure for the appointment of the arbitrators.

In the absence of such an agreement:

- if there are three arbitrators, each party shall appoint an
- arbitrator and the party-appointed arbitrators shall appoint the third arbitrator. If a party fails to appoint its arbitrator within 30 days of receiving the request from the other party to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment must be made, upon the request of any party, by the institution administering the arbitration or, failing that, by the courts;
- if there is a sole arbitrator, he shall be appointed, at the request of any party, by the institution administering the arbitration or, failing that, by the courts.

If the dispute involves more than two parties and they cannot reach an agreement on how to constitute the arbitral tribunal, the arbitrator or arbitrators shall be appointed by the institution administering the arbitration or, failing that, by the courts.

Qualification Of Arbitrators

Article 1660 of the CCC establishes that any person with full civil capacity can act as arbitrator. The parties may agree that the arbitrators meet certain conditions of nationality, profession or experience.

Void Provisions

Pursuant to article 1661 of the CCC, a clause that privileges one party with regard to the appointment of arbitrators is null.

Arbitrators' Obligations

Article 1662 of the CCC provides that the arbitrator who accepts the appointment enters into a contract with each of the parties and undertakes:

- to disclose any circumstance prior or after his acceptance that might affect his independence or impartiality;
- to remain in the arbitral tribunal until the termination of the arbitration, unless there is an impediment or a legitimate cause for resignation;
- to respect the confidentiality of the proceedings;
- to be available to conduct the arbitration diligently;
- to participate personally in hearings;
- to deliberate with the other arbitrators; and
- to render a reasoned award within the established time limit.

In all cases, the arbitrators must ensure equality of the parties, the principle of adversarial debate and sufficient opportunity to present their case.

Challenge Of Arbitrators

Article 1663 of the CCC sets forth that arbitrators may be challenged for the same reasons as the judges in accordance with the law of the seat of the arbitration.

Article 17 of the Federal Procedural Code, for example, establishes the following grounds for recusal:

the judge is a relative within the fourth degree of consanguinity or the second degree of affinity with any of the parties, their representatives or lawyers;

the judge, or his relatives within the grades mentioned above, has an interest in the case or in another similar case, or has a company or partnership (shareholder) with any of the parties, prosecutors or lawyers, unless the company is a ***sociedad anónima*** (corporation);

- the judge has a pending lawsuit with the challenger;
- the judge is a creditor, debtor or guarantor of any of the parties, with the exception of official banks;
- the judge has reported a crime or has filed a criminal action against the challenger; or the challenger has reported a crime or has filed a criminal action against the judge prior to the initiation of the lawsuit;
- the judge has been reported by the challenger under the impeachment law, provided that the Supreme Court has decided to proceed with the impeachment;
- the judge has been the lawyer of any of the parties or has issued an opinion or made recommendations concerning the case before or after its initiation;
- the judge has received important benefits from either party;
- the judge has a friendship, expressed by great familiarity or frequent treatment, with any of the parties; and

- the judge holds enmity, hatred or resentment against the challenger, expressed by known facts, unless the attacks or offences against the judge were made after his involvement in the case commenced.

The challenge is resolved by the institution administering the arbitration or, failing that, by the courts. The parties may agree that the challenge is resolved by the other arbitrators.

Although it is not expressly established in the CCC, it is reasonable to assume that the parties may also agree that the reasons for challenging the arbitrators and the procedure be governed by the rules of an arbitral institution.

Arbitrators' Compensation

Pursuant to article 1664 of the CCC, the parties and the arbitrators may agree their fees or how they should be determined (eg, pursuant to the rules of the chosen arbitral institution). If there is no agreement, the fees of the arbitrators shall be fixed by the court, in accordance with local rules applicable to the extrajudicial activity of lawyers.

Functus Officio

Article 1665 of the CCC establishes that the powers conferred to arbitrators through the arbitration agreement are extinguished with the issuance of the final award, except for clarification or additional decisions, in accordance with the agreement of the parties or the law of the seat.

CONCLUSIONS

The enactment of a federal law on arbitration to which the provinces could have adhered would have been the desirable mechanism to avoid a double regulation of arbitration and to unify federal and provincial laws on this matter. As explained, the double regulation established by the CCC and the procedural codes may give rise to discussions on the procedural nature of some of the CCC's provisions, and on whether they are unconstitutional on the basis that Federal Congress is not empowered to regulate procedural matters.

Notwithstanding the above, the CCC contains several provisions related to the 'contract of arbitration' that are beneficial for arbitration, and that, unlike some procedural codes, are in line with modern legislations and treaties. The positive aspects of the CCC are rather overshadowed by a couple of provisions that might cause problems in the development of arbitration if they are not correctly interpreted by scholars and courts. It is expected that these doubts will be gradually dispelled with the first cases to be resolved under the CCC.

Notes

1. Roque J Caivano, ***Arbitraje***, 2º ed., Ad-Hoc, Buenos Aires, 2008, pp. 54-55.
2. Roque J Caivano, Arbitraje, 2º ed., Ad-Hoc, Buenos Aires, 2008, pp. 141-144; Julio C Rivera, ***Arbitraje comercial: internacional y doméstico***, LexisNexis, 2007, p. 203. In 1990, the Commercial Court of Appeals took the opposite view in ***Naviera Pérez Companc v Ecofisa*** (ED 143-436). After considering circumstances that appear to be somewhat exceptional (eg, that arbitration was domestic, the wording employed by the parties in the arbitration clause, and the fact that the arbitration involved actions of the federal government that were deemed not arbitrable), the court decided to review and rewrite the terms of reference drafted by an ICC arbitral tribunal.

3. 'Rocca, JC c/ Consultara S.A. s/ ordinario' (Expte. R. 298. XXIII. ROR), CSJN, 31.05.1999, Fallos 322:1100.
4. Diego P. Fernández Arroyo, commentary to article 2605, in Julio César Rivera and Graciela Medina (dirs.), Código Civil y Comercial de la Nación Comentado, T VI, La Ley, Buenos Aires, 2014.
5. Gustavo Parodi, commentary to article 1649, in Julio César Rivera and Graciela Medina (dirs.), Código Civil y Comercial de la Nación Comentado, T VI, La Ley, Buenos Aires, 2014.
6. 'Otondo, César AC Cortina Beruatto SA', Cámara Nacional de Apelaciones en lo Comercial, Sala E, 11.06.2003, LL 2003-F -744.
7. Article 22 of MERCOSUR Agreement on International Commercial Arbitration.

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Summary

GENERAL STIPULATIONS
FINAL CONSIDERATIONS

On 25 June 2015, the new Conciliation and Arbitration Law No. 708 was enacted, with the purpose of providing the new rules for the application of conciliation and arbitration as alternative methods to resolve controversies within Bolivian territory.

The new Conciliation and Arbitration Law has abrogated the previous Law No. 1770 of Arbitration and Conciliation, in force in Bolivia since 10 March 1997, which – in spite of any flaws – was based on the United Nations Commission on International Trade Law (UNCITRAL) model law and provided the legal framework which allowed the growth and development of arbitration in Bolivia.

The Conciliation and Arbitration Law No. 708 (Law No. 708) comprises 135 articles, distributed under four main titles, chapters and sections.

Arbitration is addressed in Title III of Law No. 708 and includes various modifications and novelties in comparison with the previous law, inter alia, it divides the arbitration into four phases (initial, merits, granting of the award and recourses), allows for a maximum duration of the merits phase of 270 days, exceptionally extendable to 365 days, and incorporates the emergency arbitrator.

Notwithstanding the fact that Law No. 708 encompasses diverse elements worthy of comment, the descriptive analysis contained herein focuses on Chapter II of Title IV (special regimes), which is dedicated to investment controversies with the Bolivian state. In turn, Chapter II is divided in three sections that provide for applicable general stipulations (section I), controversies relating to Bolivian investment (section II) and controversies relating to foreign and mixed investment (section III). Each of these sections will be addressed below.

GENERAL STIPULATIONS

Principles Applicable To Investment Dispute Resolution

In addition to those principles established as part of the general dispute resolution stipulations provided by Law No. 708 (good faith, celerity, peace culture, economy, purpose, flexibility, aptitude, equality, impartiality, independence, legality, oral process and willfulness), investment dispute resolution in Bolivia shall be governed by the following principles:

Equity

Consisting in the distribution and redistribution of conditions that ensure the possibility for all individuals and legal entities, to exercise their rights.

Veracity

The conciliator or the arbitrator must completely verify the facts that support their decisions, for which they should adopt the necessary, adequate and legal means, respecting the right of defence of the parties.

Neutrality

The conciliator or the arbitrator have complete freedom and autonomy to exercise their attributions and they must remain impartial during the proceedings, having no personal, professional or commercial relationship with either party or third parties with an interest, nor should they themselves have an interest in the controversy.

Mutual Acceptance

Parties submit voluntarily to the effects of conciliation or arbitration.

Reasonableness

The decisions of the arbitrator must be oriented to the protection of legal certainty, the values of the Bolivian Political Constitution, prudence and proportionality.

Investment Dispute Resolution Features

Pursuant to Law No. 708, any controversies of a contractual or non-contractual nature that involve the state and arise from or are related to an investment made under Law No. 516 for the Promotion of Investments[1] shall be bound by the following rules:

- investment controversies shall be subject to Bolivian jurisdiction, laws and authorities.
- the parties must submit the controversy to conciliation prior to arbitration;
- conciliation or arbitration will be local;
- conciliation or arbitration will have the territory of the plurinational state of Bolivia as their seat. Nevertheless, hearings, evidence production and other procedures, could be conducted outside of Bolivian territory; and
- the existence of an arbitration clause or the willingness to conciliate, do not limit or restrict the attributions and competences of control and supervision from the corresponding regulatory entities and competent authorities, to whom the parties will be subjected at all times according to applicable norms.

In addition, Law No. 708 states that controversies with public entities which fall within the stipulations of the previous paragraph will be resolved in the following manner:

- By the application of section II related to disputes that involve Bolivian investment: when they arise as a consequence of the interpretation, application and execution of decisions, activities and regulations between partners of a state inter-governmental company; and when they arise within and between state companies and state inter-governmental companies.
- By the application of section III related to disputes that involve foreign investment: when they arise as a consequence of the interpretation, application and execution of decisions, activities and regulations between partners of a state mixed company and mixed company; and when they arise within and between state mixed companies and mixed companies.

Controversies Relating To Bolivian Investment

Law No. 708 stipulates that the following common rules shall apply to conciliation and arbitration regarding controversies that involve Bolivian investments made by a Bolivian individual or legal entity, whether public or private:

- conciliation and arbitration will be administered by a Bolivian centre;
- applicable rules for conciliation or arbitration will be those pertaining to the center chosen by the parties; and
- the nominating authority will be appointed by the centre chosen between the parties.

Moreover, in the case of conciliation, the conciliator will be appointed by the parties based on the list of conciliators from the chosen centre. In case of disagreement, the parties may request that the appointment is made by the nominating authority.

As regards arbitration, the following rules shall apply:

- the controversy will be solved by a sole arbitrator or a tribunal formed by three arbitrators, in which case each party will appoint one arbitrator from the list of the centre chosen by the parties;
- the third arbitrator will perform as president of the arbitration tribunal and will be elected by the two arbitrators appointed by the parties from the list of arbitrators of the chosen
- centre;
- in case of disagreement regarding the appointment of a sole arbitrator or the president of the tribunal, the appointment shall be made by the nominating authority;
- the sole arbitrator or arbitral tribunal shall apply the Bolivian constitution, laws and norms to decide the merits of the dispute; and
- the arbitration shall be at law.

Controversies Relating To Foreign Investment

For the conciliation of disputes which involve the Bolivian state and foreign investment, the following rules shall apply:

- The conciliator shall be appointed by the parties. In the event of a disagreement, the parties may request that the appointment of the conciliator be performed by the nominating authority, which shall be designated by the conciliation centre or by the secretary general or equivalent authority of the centre for the solution of investment controversies of an organisation of which Bolivia is a part of, within the framework of an integration process.
- The conciliation rules shall be those chosen by the parties. If no agreement is reached, the applicable conciliation rules shall be those of the centre for the solution of investment controversies of an organisation of which Bolivia is a part, within the framework of an integration process.

Pursuant to Law No. 708, in order to solve any dispute which involves the Bolivian state and foreign investment by means of arbitration, the following rules shall apply:

- The arbitral tribunal shall be comprised of three arbitrators, with each party having the right to appoint one arbitrator. The third arbitrator shall be the president of the tribunal and shall be appointed by the two arbitrators selected by the parties. If no agreement is reached, the nominating authority will conduct the appointment upon request of the parties.
- The nominating authority shall be elected by the parties. If no agreement is reached, the nominating authority shall be the secretary general or equivalent authority of the centre for the solution of investment controversies of an organisation of which Bolivia is a part, within the framework of an integration process. If the latter is non-existent,

the nominating authority shall be the Secretary General of the Permanent Court of Arbitration in The Hague.

- The arbitral tribunal shall apply the Constitution, laws and norms of the Plurinational State of Bolivia to decide the merits of the controversy.
- The arbitration rules shall be those selected by the parties. If no agreement is reached, the applicable arbitration rules shall be those of the centre for the solution of investment controversies of an organisation of which Bolivia is a part, within the framework of an integration process.
- The arbitration term may be extended up to an additional 600 calendar days.[2]
- The arbitral tribunal shall decide and resolve any objection to jurisdiction as an issue of preliminary nature.
- The arbitral award shall be definitive and unappealable. The arbitral award shall be issued within a term of 90 calendar days to be counted from the last procedural act. The term may be extended only once for an equivalent number of days, unless the arbitration rules chosen by the parties provide otherwise.
- The arbitration shall be resolved at law.

Challenge Of Arbitral Awards

Bearing in mind that in accordance to the aforementioned provisions regarding investment arbitration, the seat shall be located in Bolivia; the corresponding arbitral award shall be subject to the recourses allowed by local law. In this regard, Law No. 708 establishes that the only way to challenge an arbitral award is by means of a nullity recourse. The grounds that allow the competent judicial authority to declare an arbitral award as null and void are as follows:

- arbitrability (the subject matter of the dispute is not capable of settlement by arbitration);
- public policy; and
- if the party requesting the nullity of the award proves one or more of the following: the existence of grounds for annulment or nullity of the arbitration clause according to civil law; right of defence violations during the arbitration proceedings; that the arbitral tribunal exceeded its powers in the award rendered, deciding ultra petita over controversies not comprehended by the arbitration clause; or irregular constitution of the arbitral tribunal.

The parties may invoke one or more grounds for nullity of the award if such causes were raised during the course of the arbitration proceedings.

The nullity recourse shall be filed before the sole arbitrator or the arbitral tribunal that issued the award, reasoning the alleged grievance within a term of 10 days from the date the arbitral award was notified or the notification date of the amendment, complementation or clarification of the award. The nullity recourse shall be notified to the other party, which shall have the same period of time to respond. Once this term has finalised, the sole arbitrator or the arbitral tribunal, with or without said response, shall grant the recourse determining the submission of the supporting documents to the competent judicial authority of the

jurisdiction where the arbitration took place. This submission must be made within three days from the admission of the nullity recourse.

The sole arbitrator or the arbitral tribunal will reject with no further ado any nullity recourse filed past the 10-day term or not founded on the grounds described above.

The competent judicial authority will declare the admission of the recourse once the supporting documents have been received. When the nullity of an award is requested, the judicial authority may suspend the enforcement of the award, if applicable and if requested by one of the parties, for the time lapse the authority deems necessary in order to give the sole arbitrator or arbitral tribunal the opportunity to reinitiate the arbitration proceedings or to adopt any measure that in its perspective eliminates the grounds that motivated the nullity of the award.

The judicial authority will issue a resolution within a term of 30 days from the date of reception of the case file. The judicial authority may admit the production of evidence within an eight-day term, according to civil procedure.

The resolution of the nullity recourse admits no further appeals or recourses.

Nevertheless, in the event that the nullity recourse is rejected by the sole arbitrator or arbitral tribunal, the affected party or parties could turn to the competent judicial authority of the place where the award was issued, within a term of three days, for the purpose of requesting admission of the recourse.

In such a case, the judicial authority will require the sole arbitrator or the arbitral tribunal to submit the supporting documentation in a term of three days from the reception of the notice. The judicial authority will solve the matter within three days from the reception of the documentation.

Recognition And Enforcement Of Foreign Awards

Notwithstanding the fact that investment arbitration under the new Law shall only generate awards to be rendered in Bolivia, due to the relevance of the subject and the potential existence of awards to be issued under arbitration proceedings currently in place against the Bolivian state, we hereby describe the process of recognition and enforcement of foreign arbitral awards.

Law No. 708 commences the description of the process by stating that any arbitral award issued in a seat different from the Bolivian territory shall be deemed as a foreign arbitral award. Furthermore, it establishes that foreign awards will be recognised and enforced in Bolivia in accordance with the rules of judicial international cooperation established in the current Code of Civil Procedure and the treaties related to recognition and enforcement of foreign awards, so long as they do not contradict the procedure established by Law No. 708.

Unless otherwise agreed by the parties and in the case of more than one international applicable instrument, the treaty or convention most favourable to the party that requested the recognition and enforcement of the award shall apply. In the absence of any treaty or convention, foreign arbitral awards shall be recognised and enforced in Bolivia according to the stipulations of Law No. 708.

Regarding causes for inadmissibility, the new Law provides that the recognition and enforcement of a foreign award will be denied and declared inadmissible for the following reasons:

- existence of any grounds for nullity in accordance with the provisions relating to the nullity recourse, demonstrated by the party against which the foreign award recognition and enforcement was invoked;
- absence of enforceability owing to non-existence of writ of execution, nullity or suspension of the foreign award by a competent judicial authority of the state where it was issued, demonstrated by the party against which the foreign award recognition and enforcement was invoked;
- existence of causes for nullity or inadmissibility established by currently valid international treaties or conventions; and
- breach of the rules contained in the civil procedure code regarding international judicial cooperation.

Concerning competence and authority, the request for recognition and enforcement of a foreign arbitral award shall be filed before the Bolivian Supreme Tribunal of Justice.

The party that requests the recognition and enforcement of a foreign award must submit duly legalised copies of the arbitration agreement and foreign award, and if such agreement and award are not in Spanish, the petitioner must submit a translation of the documents signed by an authorised translator.

The recognition and enforcement procedure states that once the request is filed, the Supreme Tribunal of Justice will submit it to the other party so that it may respond within 10 days from its notification, having the opportunity to file and offer the evidence considered necessary.

Evidence must be produced in the maximum period of eight days from the last notice to the parties with the decree that initiates such a term. Once this term is over, the Supreme Tribunal of Justice has five days to issue a resolution.

If the request is admitted, the enforcement of the foreign arbitral award shall be executed by the competent judicial authority appointed by the Supreme Tribunal of Justice, corresponding to the domicile of the party against which the foreign award recognition and enforcement was invoked or by any other authority with jurisdiction.

Oppositions to the enforcement of a foreign arbitral award can be filed before the Supreme Tribunal of Justice based on documentary evidence regarding the compliance of such an award or the existence of a pending nullity recourse. Should this be proven, the Supreme Tribunal of Justice will suspend the recognition and enforcement of the foreign award.

FINAL CONSIDERATIONS

In the past few years rumours have been circulating regarding the abolishment of arbitration from the Bolivian legal system. Fortunately, the new Law No. 708 discards these rumours, confirming and ratifying that the Bolivian state considers conciliation and arbitration to be valid legal mechanisms for dispute resolution.

In summary, having abrogated the previous Arbitration and Conciliation Law No. 1770, the new Law incorporates a series of modifications and introduces specific rules concerning investment dispute resolution involving the Bolivian state.

The specific chapter dedicated to investment dispute resolution establishes the central rules that will govern arbitration, distinguishing two sections, one referring to controversies related to Bolivian investment and the other to foreign investment.

On the subject of foreign investment disputes, these main rules provide that prior to the initiation of arbitration proceedings, the parties must submit their dispute to conciliation. If the controversy is further submitted to arbitration, the arbitration process shall be local, entailing that the seat will be the Bolivian territory and that the dispute will be subject to Bolivian jurisdiction, laws and authorities.

Notwithstanding the foregoing, the new Law allows for the parties to freely determine the applicable arbitration rules, which in the case of foreign investment controversies may be those of the ICC, LCIA, ICDR, UNCITRAL or any other chosen by the parties, providing the referred mandatory conditions are met. If no consensus is reached, the applicable arbitration rules shall be those of a centre for the solution of investment controversies of an organisation of which Bolivia is a part of, within the framework of an integration process.

The latter is a relevant feature of the new investor state arbitration provisions, considering that before the enactment of Law No. 708, there was a trend intending to apply to foreign investment the same conditions now established for Bolivian investment. That is to say, the arbitration rules had to be those of a Bolivian centre, which also implies that the appointment of the sole arbitrator or arbitral tribunal would be limited to the list of the Bolivian centre chosen by the parties.

In addition, a nominating authority can be elected by the parties. If no agreement is met, the nominating authority shall be the secretary general or equivalent authority of the centre for the solution of investment controversies of an organisation of which Bolivia is a part of, within the framework of an integration process, and otherwise, the nominating authority shall be the Secretary General of the Permanent Court of Arbitration in The Hague.

With regard to the arbitral award, it should be noted that bearing in mind the main features described above, the challenge of such an award must be addressed to the court of the seat of the arbitration: Bolivia. As a consequence, pursuant to Law No. 708, the award can be challenged by means of a nullity recourse, providing the following grounds for challenge: arbitrability, public policy, invalidity of the agreement to arbitrate, arbitral tribunal's excess of powers and procedural irregularities.

Finally, even though the conditions discussed above restrict foreign investors from choosing and having a 'neutral' seat of arbitration among other features, Law No. 708 provides a clear framework and rules to be considered in advance by foreign investors currently analysing the feasibility of investing in Bolivia, which contrasts with the uncertainty that surrounded the subject in previous years.

Notes

1. Pursuant to Law No. 516, 'investment' is defined as the allocation of investment contributions within the different investment mechanisms provided by law, aimed at the permanent development of economic activities and the generation of income which contributes to the social and economic development of the country
   As investment conditions, Law No. 516 establishes that the investments to be made in Bolivia must take into account: (i) that the transfer of foreign capital is funnelled through the local financial system; (ii) that the foreign investments comply with the regulations on transfer costs established in the country; (iii) that the profitability of

the proposed investment projects that purport to be classified as preferred is not conditioned upon the incentives provided by the state; (iv) that the state does not endorse or guarantee any internal or external credit contracts executed by private individuals or legal entities that are either Bolivian or foreign; (v) that the transfer of technology is to be performed in accordance with the terms thereto; (vi) that the employment relationships that emerge from the investments are subject to the General Labour Law and its regulations; and (vii) that the investments established within the Law are subject to the tax, customs, environmental and other applicable laws in the country.

2. It should be noted that according to the general rules applicable to arbitration under Law No. 708, the merits phase which begins with the acceptance of the sole arbitrator or the constitution of the arbitral tribunal, as the case may be, ends with the conclusive hearing or the presentation of closing written statements or the last procedural act. This phase allows for a maximum duration of 270 days, exceptionally extendable to 365 days.

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Summary

THE NEW BRAZILIAN ARBITRATION LAW (LAW NO. 13,129/15)

Brazil has recently witnessed two major legal reforms that brought important changes to the law governing arbitration.

The first and most significant reform is the recent amendment to the Brazilian Arbitration Law, Law No. 9,307/96 (BAL). The new Law (No. 13,129/15) deals with several arbitration issues, including disputes involving state entities, shareholders' disputes and interim measures. (BMA's senior partner Francisco Müssnich was a member of the drafting commission of the bill that resulted in the new BAL.)

The second major reform is the enactment of a New Code of Civil Procedure, Law No. 13,105/15 (NCCP), in force as of March 2016. The NCCP establishes new procedural rules aimed at enhancing the interaction between the Brazilian courts and arbitrators.

The purpose of this article is to look at the main changes those two legal reforms have made to the legal framework for arbitration in Brazil. The idea here is not to provide an exhaustive analysis of all rules provided for in the two new laws that might have an impact on the Brazilian arbitration regime, but rather to present a summary of the key changes.

The first section of this article analyses the more important amendments to the BAL contained in Law No. 13,129/15. The second examines the main new rules in the NCCP related to arbitration.

THE NEW BRAZILIAN ARBITRATION LAW (LAW NO. 13,129/15)

The enactment of the original BAL back in 1996 was paramount for the consolidation of arbitration in Brazil. Together with Brazil's adherence to the 1958 New York Convention in 2002 (Decree-law No. 4,311/02), the BAL laid down the legal foundation that allowed Brazil to conquer its place among the major arbitration-friendly jurisdictions in the world.

Law No. 13,129/15 represents the first direct reform to the Brazilian arbitration regime in 19 years. The new law did not bring about a complete change in the BAL, but rather focused on specific issues. Apart from formal revisions to align the BAL with legislative changes that took place after 1996 and some corrections to the original wording of the BAL, the major purposes of the reform were to turn consolidated case law into black-letter law and to fill in some gaps left unanswered by the original version of the BAL.

In the following paragraphs, we present a brief analysis of the most significant changes contained in the new law.

Arbitrability Of Disputes Involving State Entities

The Brazilian Superior Court of Justice's case law had long confirmed the possibility of arbitrating disputes involving indirect state entities. However, some controversy remained in relation to the arbitrability of disputes involving direct state entities. The new Law ended that controversy by expressly allowing Brazilian direct and indirect state entities to arbitrate disputes, as long as the disputes involve disposable property rights.

The new Law also provides that disputes involving state entities will be governed by law (and not be decided ex aequo et bono) and will remain public throughout the process (ie, the proceeding cannot be confidential). Moreover, the amendment expressly states that the same authority or body responsible for executing settlement agreements has the power to execute arbitration agreements, whose validity will thus become easier to ascertain.

Corporate Disputes

The new Law ends a long-lasting controversy in Brazil by confirming that arbitration agreements included in companies' by-laws are binding on all shareholders, including those absent or dissented from inclusion of the arbitration clause. Dissenting shareholders can exercise appraisal rights and withdraw from the company.

This issue has been the subject of a long debate among Brazilian practitioners since a new provision was added in the Brazilian Corporations Law (Law No. 6,404/76) to allow companies to include arbitration clauses in their by-laws. Whereas some argued that the majority principle should also apply to arbitration agreements, and thus obligate all shareholders to submit disputes to arbitration (even those who voted against the inclusion of the arbitration agreement in the company's by-laws), others contended that arbitration could not be imposed on a shareholder without its consent to arbitrate. The new Law puts an end to this debate.

Appointment Of Arbitrators

The new Law made an important change regarding the appointment of arbitrators.

The Law allows the parties to derogate from any institutional rules that restrict their choice of arbitrators to the names contained in the institution's roster of arbitrators. Some Brazilian institutions adopt the practice of limiting the parties' choice to a specific pool of arbitrators. Those institutions were against the amendment, arguing that the change would lead to a drop in the quality of the arbitral awards rendered under their auspices. Nevertheless, the amendment prevailed.

If the parties or the co-arbitrators do not reach an agreement on the appointment of the jointly named arbitrator (as can occur in multiparty arbitrations), the arbitration rules chosen by the parties will govern the constitution of the tribunal.

Limitation Of Claims

The new Law expressly establishes that the institution of the arbitration interrupts the limitation period applicable to the claim, even if the arbitral tribunal later terminates the proceedings based on lack of jurisdiction.

According to the BAL, the arbitration commences only when all arbitrators accept their appointment (article 19). Nevertheless, the new provision clarifies that the limitation period is deemed to have ceased running as of the date of filing of the request for arbitration (and not from the date when all arbitrators accept their appointment). The amendment ends a long-standing controversy in Brazil as to the rules governing the limitation of claims submitted to arbitration.
Interim and urgent measures

The new Law added a chapter to the BAL on the subject of interim and urgent measures. While the original BAL already allowed arbitral tribunals to request support from the courts to enforce interim measures (article 22, paragraph 4), the new Law expressly authorises the parties to seek precautionary measures before the courts prior to the constitution of the arbitral tribunal.

Those new provisions essentially consolidate the Brazilian Superior Court of Justice's case law on the powers of arbitrators to order interim measures and to review measures granted by the judiciary before the arbitration commences.

Under the new regime, the party requesting the judicial interim measure must initiate arbitral proceedings within 30 days from the date of enforcement of the measure. If the party fails to do so, the interim measure automatically loses its effects. Once the arbitral tribunal is formed, the arbitrators have the authority to uphold, modify or revoke any urgent measure previously granted by the courts. Moreover, according to the new Law, after the arbitral tribunal is constituted, the parties must request any interim measure directly from the arbitrators.

Arbitral Letter

The new Law introduces a rule governing communication between the arbitrators and the courts, which will happen by means of arbitral letter. The arbitral letter is similar to a rogatory letter exchanged by judges of different jurisdictions, enabling arbitrators to request and obtain the aid of the courts, and vice versa. This opportunity is welcome: the creation of a specific means of communication between arbitrators and the courts will remove uncertainties about the interaction between those institutions, and make it more efficient.

The new provision states that the arbitral tribunal may issue an arbitral letter to the judiciary asking the courts to enforce or order certain procedural acts (such as to compel a non-cooperative witness to testify before the arbitral tribunal). In addition, the new Law provides that the judicial proceedings initiated by the arbitral letter will be confidential, if the interested party proves that a confidentiality provision applies to the arbitral proceedings. As seen below, the NCCP provides for the procedure to be followed by the courts to enforce the request contained in the arbitral letter.

Partial Awards

The new Law adds a provision recognising the arbitral tribunal's power to render partial awards. That change essentially consolidated the existing practice in Brazil. In line with the international trend, most Brazilian arbitral institutions have added provisions to their arbitration rules establishing the arbitrators' authority to render partial awards. Accordingly, a majority of Brazilian courts have also recognised the validity of partial awards. Nonetheless, the amendment was important because it ends any lingering controversy over the validity of partial awards rendered in Brazil.

The new Law also puts an end to a more controversial issue regarding the time frame for seeking the annulment of partial awards. The amendment expressly states that the 90-day period for asking the courts to vacate a partial award starts from the parties' notice of that award (and not from the notification of the final award). This amendment ends the dispute over whether the parties had the right to seek annulment of a partial award before the tribunal renders its final award.

Request For Clarification

The new Law entitles the parties to agree on a deadline different from the five-day period set forth in the BAL for requesting the arbitral tribunal to clarify any doubt or correct any non-substantive errors] contained in the award. Furthermore, the new Law confirmed the prevailing view among Brazilian practitioners that the 90-day term for vacating the award starts from the decision on the request for clarification (whenever the parties present such a request) and not from the rendering of the arbitral award.

That change is most welcome. The original version of the BAL did not allow the parties to modify the five-day legal period to present a request for clarification, even though the

time period established in most Brazilian and international institutional rules is longer. Also, there was some controversy as to whether the time period for filing an annulment claim was interrupted by the request for clarification. Before the changes to the BAL, parties that filed a request for clarification in accordance with the arbitration rules (but later than the five-day legal term) ran the risk of having a future annulment claim time-barred.

Deadline For Rendering The Final Award

In line with the well-established practice in Brazil, the new Law confirms that the parties and the arbitrators may jointly agree on extending the deadline for the arbitrators to render the final award.

The 1996 version of the BAL stated that the award should be rendered within the time period established by the parties. In the absence of such a time period, the Law required the arbitrators to render an award within six months from the constitution of the arbitral tribunal (article 23).

As the BAL provides that an award rendered after the applicable deadline is null, the new rule allowing the arbitral tribunal to extend the deadline by agreement with the parties is important to avoid the undesirable risk of having the award vacated or having to render a premature award to dodge an annulment claim.

Annulment Of The Arbitral Award

The new Law makes two major changes to the provisions applicable to the annulment of arbitral awards.

First, the amendments corrects an error in the original version of the BAL, stating that the nullity of the arbitration agreement, and not of the submission agreement, is grounds for vacating the award. That change was important to clarify that an award based on a void arbitration clause (and not only on a void submission agreement) is null.

Second, the new Law excludes the possibility of vacating an award that fails to decide all claims submitted to arbitration. Now, the parties will be able to apply to the courts for an order requiring the arbitral tribunal to render a complementary award to resolve undecided issues. The new provision, however, does not state if
the same tribunal that rendered the original award should render the complementary award or if a new tribunal should be constituted.

Recognition Of Foreign Arbitral Awards

The new Law recognises that the Superior Court of Justice (and not the Federal Supreme Court, as provided for in the original version of the BAL) has jurisdiction to decide requests for recognition of foreign arbitral awards. This change simply aligns the BAL with the Constitutional Amendment No. 45/2004, which transferred the authority over foreign judgments and arbitral awards from the Federal Supreme Court to the Superior Court of Justice.

Vetoes

Not all changes under the new Law were approved. The President vetoed two amendments to the BAL related to the arbitrability of disputes involving consumers and senior management employees. At the time of this article the President's vetoes were still under scrutiny before the Brazilian Congress.

Consumers

Consumer adhesion contracts are those agreements where the consumer may only adhere to the terms of the contract but does not have the opportunity to negotiate them. The vetoed amendment established that arbitration clauses included in those agreements should prevail if that the consumer took the initiative to initiate the arbitral proceedings or expressly agreed to instituting arbitration proceedings. According to the reasons for veto, the amendment would have inadvertently expanded the use of arbitration to resolve consumer disputes without clearly requiring the consumer's consent at the outset of the arbitral proceedings and not just at the time the adhesion contract was signed. According to the Brazilian Ministry of Justice, the vetoed amendment could endanger the well-established principle of protection of consumers.

Senior Management Employees

The arbitrability of labour disputes is an open question in Brazil. The vetoed amendment attempted to resolve the controversy in part by establishing that arbitration clauses contained in managers' or directors' individual employment agreements would prevail, as long as the manager or director initiated the arbitral proceedings or expressly agreed to instituting arbitration proceedings. The Brazilian Ministry of Labour and Employment took a stand against the amendment, pointing out that the change would bring about an undesirable distinction between employees and would do so by resorting to terms (manager and director) not technically defined in Brazilian labour legislation.

New Code of Civil Procedure (Law No. 13,105/15)

The main goal underlying the NCCP is to enhance the effectiveness of resolution of disputes in Brazil. The NCCP therefore encourages the use of alternative dispute resolution mechanisms and sets forth specific rules to foster the interplay between arbitrators and the Brazilian courts.

In the following paragraphs, we present a brief analysis of the most significant rules established in the NCCP from the arbitration standpoint. As will be seen, some of the amendments to the BAL reflect the new rules established in the NCCP.

Arbitral Letter

The NCCP provides for new rules governing the procedure applicable to the arbitral letter. According to the NCCP, in issuing an arbitral letter, the tribunal must also send a copy of the arbitration agreement as well as evidence of the arbitrators' appointment and acceptance (article 260).

The arbitrators issue arbitral letters to request support from the courts in undertaking or ordering certain procedural acts, including those deriving from interim measures (article 237, IV). According to the new Code, the procedural acts that the courts may perform in response to arbitral letter include: serving and notifying parties and witnesses; collecting documentary and oral evidence; undertaking measures to freeze assets; and enforcement of procedural orders (article 69).

Confidentiality

The current Brazilian Code of Civil Procedure does not expressly establish that court proceedings initiated in connection with confidential arbitrations should remain confidential before the courts. The NCCP changes that regime. Under the new Code, all

proceedings ancillary to confidential arbitrations, including those related to arbitral letters, will remain confidential, as along as the party proves the confidentiality of the arbitration (article 189, IV).

Objection To The Courts' Jurisdiction

Under the NCCP, if the defendant fails to raise an objection to the courts' jurisdiction based on an arbitration agreement in its answer to the plaintiff's initial complaint, the defendant has implicitly waived its right to arbitrate and accepted the courts as the proper forum to resolve the parties' dispute (article 337). The current Code does not have an express rule on the question. That gap led to doubts as to whether the failure to raise an objection to the courts' jurisdiction could amount to an implied waiver. The NCCP puts an end to those doubts.

Enforcement Of Arbitral Awards

The NCCP establishes new rules on the enforcement of arbitral awards. The new Code provides that the debtor will be served with notice by the competent civil court to comply with the award within 15 days (article 515, 1st paragraph). The NCCP also clarifies that the creditor may seek enforcement of arbitral awards before the courts where the debtor has its place of business, the debtor's assets are located, or the obligations set forth in the award being enforced are to be performed (article 516, sole paragraph).

Recognition Of Foreign Arbitral Awards

The NCCP makes it clear that the recognition of foreign arbitral awards is governed by the applicable treaty and the BAL, and that the Code's rules apply only in a subsidiary fashion (article 960, third paragraph). That represents an important development in relation to the current regime, which does not clearly state that the 1958 New York Convention and the BAL prevail with regard to the recognition of foreign awards.

Appeal Against Judgment Compelling Arbitration

The NCCP reinforced the current Code's rules regarding the effects of an appeal from a judgment compelling the commencement of arbitration. The NCCP states that the appeal does not suspend the effects of the judgment, and consequently the interested party can initiate arbitral proceedings immediately, without having to wait for a decision from the court of appeals. The court of appeals may only suspend the lower court judgment in favour of arbitration if the appellant proves that its appeal is based on relevant grounds (there is good reason for the appeal/the appeal is not frivolous or designed to delay arbitration) and the appellant may suffer irreparable harm if the court of appeals does not suspend the judgment (article 1012).

Both the amendments to the BAL and the NCCP have made significant changes to the legal framework for arbitration in Brazil. The reforms ratify the support that the Brazilian courts have been giving to arbitration over the past two decades. (A member of the Superior Court of Justice led the drafting commission of the bill that resulted in the new Arbitration Law.) Apart from the downside inherent to any legal reform (such as 'switching costs'), the general expectation among Brazilian practitioners is that the two new sets of rules will strengthen the already consolidated use of arbitration in Brazil.

British Virgin Islands

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Summary

THE ACT
THE AWARD
ENFORCEMENT OF FOREIGN AWARDS
CONFIDENTIALITY
REMEDIES
COSTS

The legislation governing arbitration in the British Virgin Islands (BVI) is the Arbitration Act 2013 which came into force on 1 October 2014 and which repealed the Arbitration Act 1976 (the latter will nevertheless continue to govern arbitrations commenced before 1 October 2014. The Act, contains comprehensive legal provisions that take into account modern principles and practices of arbitration and incorporates many of the articles of the UNCITRAL Model Law (Model Law). But this is not simply a modernising statute; it is one which, together with the BVI's accession to the New York Convention on 25 May 2014 (making an arbitral award from a BVI tribunal enforceable in other contracting states), is designed to make the BVI as popular a seat for international arbitration as London, Paris and New York. In particular, the Act provides for the establishment of a statutory body, the BVI International Arbitration Centre (IAC), with a governing board and the power to promulgate rules under the Act.

This chapter outlines the current legislation and focuses on the enforcement of foreign awards in the BVI, which remains a 'hot topic' as far as practitioners are concerned. There are specific sections in the Act relating to mediators, but these are not examined in any detail here.

THE ACT

Overview And Jurisdiction

The Act has as its object the facilitation and attainment of a fair and speedy resolution of disputes without unnecessary delay and expense. It applies to arbitration under an arbitration agreement, whether or not the arbitration agreement is entered into in the BVI, if the place of arbitration is in the BVI. 'Arbitration agreement' is defined as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement, but must be in writing. The Act contains various mandatory provisions that will principally apply to arbitration agreements entered into before 1 October 2014 and a number of opt-in provisions that parties may choose to include in their arbitration agreement by reference.

The statute does not expressly define those matters that are arbitrable, and the common law will therefore govern whether a dispute is capable of being resolved by arbitration or not.

Except where third parties agree to be bound, an arbitration agreement (and any award) will generally only affect the parties to it. There are English authorities to the effect that an award may, in certain circumstances, be relied on in a claim against a third party for an indemnity and the BVI courts are likely to follow those authorities.

The BVI courts are also likely to follow the approach of the English courts in upholding the arbitration agreement where possible, so as to give effect to the intentions of the parties that their differences should be resolved by the arbitral process and not the courts. The liberal interpretation of arbitration clauses – thereby avoiding semantic arguments about whether the dispute 'arose out of' or was 'in connection with' or 'arose under' a contract – was forcefully espoused in England in ***Fiona Trust Corp v Privalov & Ors,*** an approach which has been endorsed in the BVI in ***Victor International Corporation and Victor (BVI) Limited v Spanish Town Development Company Limited & Ors*** (BVI HCV 2007/0293). In summary, absent express words to the contrary, parties are to be taken to have intended that all their disputes should be arbitrated.

A question that frequently arises is whether applications to appoint liquidators, or claims by minority shareholders in relation to unfairly prejudicial conduct, fall within the exclusive jurisdiction of the BVI courts or are arbitrable. In ***Zanotti v Interlog Finance Corp*** (BVIHCV 2009/0394), the BVI court held that an arbitrator could grant relief in unfair prejudice proceedings. As far as winding-up applications are concerned, in these writers' view, an order appointing liquidators over a BVI company may only be made by the BVI court. In ***Artemis Trustees Limited & Ors v KBC Partners LP & Ors*** (BVIHC (COM) 2012/0137), the BVI court held that the position is different in relation to limited partnerships. The court held that because a limited partnership, unlike a limited company, has no identity separate from the identities of its constituent members, and because the winding up or dissolution of the partnership would have no effect on the rights and interests of third parties (again, unlike the winding-up of a limited company), there was no legal obstacle to the making by an arbitrator of an order dissolving or winding up a limited partnership.

Article 16 of the Model Law is incorporated in the Act, expressly giving the tribunal the competence to rule on its own jurisdiction, including:

• any objections with respect to the existence or validity of the arbitration agreement;

• whether the tribunal is properly constituted; and

• what matters have been submitted to arbitration in accordance with the arbitration agreement.

The tribunal may rule on jurisdiction either as a preliminary question, or in its award on the merits. If, by way of preliminary question, the tribunal rules that it has jurisdiction, the court may be requested, by a dissatisfied party, to decide the question. There is no appeal from the court's determination, nor is there any appeal (including to a court) from a ruling by the tribunal that it does not have jurisdiction.

If a party commences court proceedings concerning a matter that is the subject of the arbitration agreement, then any party to that agreement can ask the court to refer the matter to arbitration. The court must make that referral (and stay the court action) unless it finds that the arbitration agreement is null and void, inoperative, or incapable of performance.

Limitation

Limitation periods are governed by the Limitation Act 1961, which expressly extends to arbitrations and which provides when arbitrations are deemed to be commenced for the purposes of calculating the relevant time limits. Contract and tort claims may not be brought after the expiration of six years from the date on which the cause of action accrued. The same time limit applies to common law actions on an award. In cases of fraud or concealment, time does not start to run until the fraud or concealment has been – or, with reasonable diligence, could have been – discovered.

The Act also expressly provides that where the court orders an award to be set aside, the period between the commencement of the arbitral proceedings and the date of the set-aside order shall be excluded in computing the time prescribed by a limitation enactment.

Conflicts Of Law

The BVI courts apply common law conflict of laws rules. The choice of law for contract provides that a contract is governed by its proper law which, in the absence of an express or implied choice by the parties, is the law with which the contract has its closest and most real connection. To the extent that foreign law is contrary to the public policy of the BVI or

to the provisions of any statute which has overriding effect, foreign law cannot be applied in arbitration proceedings in the BVI.

Under the relevant conflict rules, the BVI courts regard limitation provisions that extinguish a right as substantive, but legislation that bars the remedy and not the right is regarded as procedural.

Selection Of The Tribunal

The parties are expressly stated to be free to determine the number of arbitrators, including the right to authorise a third party, including an institution, to make that determination. If the parties fail to agree on the number of arbitrators, the IAC will decide whether it should be one or three, depending on the circumstances of the case. The court or the IAC is empowered to intervene and make appointments in circumstances broadly similar to those set out above, with articles 11, 14 and 15 of the Model Law having been given effect in the Act.

Article 13 of the Model Law, which sets out the procedure for challenging an arbitrator, is given effect in the Act.

The Act expressly provides that in the absence of an express statutory provision, the court will not interfere in the arbitration of a dispute, because subject to the observance of such safeguards as are necessary in the public interest, parties should be free to agree how their dispute should be resolved. The Act mandates that where the court does interfere, it should as far as possible give due regard to the wishes of the parties and the provisions of the arbitration agreement.

The Act also expressly provides (by importing article 18 of the Model Law) that the arbitral tribunal is required:

• to be independent;

• to act fairly and impartially between the parties, giving them a reasonable opportunity to present their cases and to deal with their opponents' cases; and

• to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means of resolving the dispute.

A person approached for a possible appointment as an arbitrator must disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence, and that obligation continues throughout the appointment.

The Act provides that the IAC may issue a code of conduct for arbitrators and mediators, as well as guidelines with respect to the procedures to be followed by and the conduct expected of 'persons connected with' the operation of the Act.

Procedure

The Act imports articles 10 to 24 of the Model Law and therefore contains detailed provisions on the procedure of the tribunal. That procedure is, subject to the provisions of the Act, very much left to the parties to agree on. Again subject to the provisions of the Act, if there is no agreement between the parties, the tribunal may conduct the proceedings in the manner that it considers appropriate. It also contains express provisions giving arbitral tribunals immunity from liability for acts or omissions in the performance of their functions, save where they have acted in bad faith.

Interim Remedies

Under the Act, articles 17 and 17A to 17G of the Model Law are brought into effect. The parties are able to agree that the tribunal should not have power to grant interim measures – however, in the absence of such agreement, the tribunal is given wide powers to:

• preserve the status quo;

• prevent harm or prejudice to the arbitral process itself;

• preserve assets and evidence; and

• make preliminary orders (which are binding on the parties but not subject to enforcement by the court).

An applicant for interim relief must satisfy the tribunal that:

• costs are not an adequate remedy;

• the harm to the applicant in the absence of the remedy substantially outweighs the harm to the respondent if the remedy is granted; and

• there is a reasonable possibility he will succeed on the merits.

A party requesting a preliminary order or interim measure will be liable for any costs or damage caused to the other party in the event the tribunal ultimately determines that the order should not have been granted.

The court itself is empowered to grant interim measures in support of any arbitral proceedings that have been or are to be commenced in or outside the BVI. This provides a statutory basis for free-standing injunctive relief. In relation to arbitral proceedings outside the BVI, interim relief can only be granted where the proceedings are capable of giving rise to an award that may be enforced in the BVI and the nature of the interim measure sought is of a type or description a BVI court is able to grant in relation to arbitration proceedings. There is no appeal from the court's grant or refusal of an interim measure under the Act.

THE AWARD

Under the Act, articles 29 to 31 of the Model Law provide for decision-making by the tribunal (by a majority in the case of more than one arbitrator, unless otherwise agreed by the parties), for an award on agreed terms after a settlement, and for the form and contents of the award.

Article 33 of the Model Law is brought into effect, enabling parties to apply within 30 days of receipt of the award to request the tribunal to correct errors in computation, or clerical or typographical errors, or to ask the tribunal to make an additional award in respect of claims omitted from the first one.

Challenging An Award

The Act provides for awards to be set aside or appealed in the following circumstances:

• the court may set the award aside in the event of a successful challenge to the arbitrator;

• where the arbitration agreement provides that the award may be challenged on the grounds of serious irregularity (or where those grounds of challenge apply automatically by virtue of the arbitration agreement having been entered into prior to 1 October 2014 and being a domestic arbitration agreement or one under which the parties have expressly provided that the agreement is to be dealt with under the 1976 Act);

• subject to the leave of the court, or the agreement of all parties, where the arbitration agreement provides that the award may be appealed on a question of law. It should be noted that an agreement to dispense with reasons for the award will be treated as an agreement to exclude the court's appeal jurisdiction and that the court has no other jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award;

• with the leave of the court under the provisions of article 34 of the Model Law. Accordingly, an award may be set aside upon a party furnishing proof that:

• a party to the arbitration agreement was under an incapacity;

• that the agreement was not valid either under the law to which the parties subjected it, or absent such indication, BVI law;

• the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

• the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. If the problematic parts can be separated from the rest, then only the problematic part may be set aside; or

• the composition of the tribunal or the procedure adopted was not in accordance with the parties' agreement, unless that agreement was in conflict with a provision of the New Act from which the parties cannot derogate, or failing the parties' agreement, was not in accordance with the New Act;

• the court finds that the subject of the dispute is not capable of being settled by arbitration under BVI law; or

• the court finds that the award is in conflict with the public policy of the BVI.
On hearing an appeal, the court may confirm, vary, or remit in whole or in part the award to the tribunal, or set it aside in whole or part.

An application under the New Act to set aside the award may not be made after three months from the date the party received the award.

An appeal upwards to the Court of Appeal from an appeal at first instance is permissible with the leave of the Court of Appeal.

ENFORCEMENT OF FOREIGN AWARDS

In principle, the Act does not affect the enforceability in the BVI of Convention Awards. Pursuant to section 36 of the 1976 Act, the enforcement of Convention Awards was mandatory, save in specific circumstances that mirrored those set out in the Convention; for example, where the arbitration agreement was invalid, a party was unable to present its case, or where enforcement of the award would be contrary to public policy. Both foreign non-Convention Awards and domestic awards could be enforced by application under the 1976 Act, which provided that an award on an arbitration agreement might, by leave of the High Court, be enforced in the same manner as a judgment or order of the High Court to the same effect. Where leave was granted, judgment could be entered in terms of the award. Awards could also, of course, be enforced by action on the award at common law, and enforcement is a gateway for permission to serve any such proceedings out of the jurisdiction.

Enforcement of awards issuing from the UK was obtained pursuant to the Reciprocal Enforcement of Judgments Act 1922, which provides that the court may, if in all the circumstances it considers it just and convenient to do so, order the award to be registered and enforced in the BVI. The 1922 Act provides for certain circumstances in which registration should not be ordered, and these largely mirror the grounds for refusing to enforce a Convention Award, such as where the tribunal acted without jurisdiction, the award was obtained by fraud, was contrary to public policy and so on.

The decision of the Privy Council in ***Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich*** [2003] 1 WLR 1041 is highly likely to be followed in the BVI, so that an arbitration award may be used to raise a defence of issue estoppel in fresh proceedings between the same parties.

The Act essentially continues the same well-tested regime for the enforcement of foreign awards from the 1976 Act, but with improvements. The principal changes are that:

• the Act explicitly provides that the grounds for refusal of enforcement that apply to a New York Convention Award also apply to the enforcement of a non-Convention Award, and in both cases those grounds are fully incorporated into the Act itself; and

• a UK arbitral award now counts as a New York Convention Award in the BVI so recourse is no longer needed to the 1922 reciprocal enforcement legislation.

CONFIDENTIALITY

The Act contains several provisions intended (save in limited specified circumstances) to maintain the confidence of arbitral proceedings, including that any court proceedings should be heard in chambers, imposing reporting restrictions and prohibiting parties from disclosing, publishing or communicating any information relating to the arbitration proceedings or the award. Where the court considers that a judgment given in closed court proceedings is of legal interest, it may direct publication in the law reports, subject to appropriate safeguards in respect of the anonymity of the parties or to delaying publication for an appropriate period not exceeding 10 years.

REMEDIES

As far as the remedy or relief to be awarded is concerned, the Act expressly empowers the tribunal to award any remedy or relief that could have been ordered by the court if the dispute had been the subject of civil proceedings. Unless otherwise agreed by the parties, the tribunal also has the same power of the court to
order specific performance or any contract, other than one relating to land or an interest in land. Despite its wide terms, we do not think the New Act empowers an arbitral tribunal to make a winding-up order. The position in relation to punitive damages is unchanged.

COSTS

Under the Act, where a challenge on the basis of serious irregularity or an appeal or application for leave to appeal is pending, the court may order the applicant or appellant to provide security for costs. There is also provision for the arbitral tribunal to include directions with respect to costs (including its own fees and expenses) in the award. Costs are entirely at the discretion of the tribunal and must be assessed by the tribunal unless the parties have agreed on an assessment by the court. The tribunal may refuse to deliver its award until its costs have been met. The parties are jointly and severally liable for those costs.

The Act also contains express provisions in respect of interest, enabling the tribunal to award interest on any monetary award and on costs, the rate and time frame of such interests to be at the discretion of the tribunal.

Maples Group

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Summary

LEGISLATIVE FRAMEWORK
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International commercial arbitration in Canada is governed by a well-developed legal framework designed to promote the use of arbitration and minimise judicial intervention. Canadian courts have consistently upheld the integrity of the arbitral process and recent case law has further established Canada as a leader in the development of reliable jurisprudence relating to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) by giving broad deference to the jurisdiction of arbitral tribunals and supporting the rights of parties seeking to enforce international arbitral awards.

LEGISLATIVE FRAMEWORK

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, however, Canada's provinces were not uniform in adopting the Model Law and a number of provinces deviated from it in certain respects. The lack of complete uniformity among the provinces led to some discrepancies in how the courts addressed arbitration issues. Nevertheless, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process and a high-level of predictability for parties to international arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (the ULCC) commenced a review of the existing model International Commercial Arbitration Act, with a view to developing reform recommendations for a new model statute. Catalysed by the 2006 Model Law amendments, the review process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014 the ULCC approved the working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada.

Among other things, the new model statute adopts all of the 2006 Model Law amendments (except option II for article 7), including those that broaden the jurisdiction of courts and arbitral tribunals to order interim relief. The new statute also establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The new model statute will become law as it is enacted by the various Canadian federal, provincial and territorial legislatures.

AN ARBITRATION-FRIENDLY JURISDICTION

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

[t]he purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any

international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.[1]

Courts across Canada have echoed these sentiments, consistently applying the competence-competence principle, showing broad deference to the decisions of arbitral tribunals, and narrowly interpreting the grounds for setting aside arbitral awards. In addition, some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.[2]

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of enforcement provisions in the Model Law. Accordingly, article V of the New York Convention, which sets out the limited grounds on which enforcement may be refused, is narrowly interpreted, and arbitral debtors have the burden of proving any allegation of injustice or impropriety that could render an award unenforceable.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada's Arbitration Committee, the British Columbia International Commercial Arbitration Centre, the ADR Institute of Canada (ADRIC), the International Centre for Dispute Resolution Canada (ICDR Canada) and the Canadian Commercial Arbitration Centre. These organisations provide
parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities.

ADRIC and ICDR Canada have recently revised and updated the procedural rules available to parties, bringing them in line with international best practices and offering an improved option for parties.

ADRIC's revisions came into force on 1 January 2014, and seek to limit the tendency of parties to domestic arbitrations to adopt litigation-like procedures. Specific changes include a narrower test for document production that accords with international standards, an interim arbitrator mechanism for urgent relief, and a prohibition on examinations for discovery.

ICDR Canada's new rules came into force on 1 January 2015, and reflect the ICDR International Arbitration Rules. The new rules include expedited procedures for claims under C$250,000, an emergency arbitrator process for urgent relief, and recognition that court procedures such as oral and document discovery are generally not appropriate in arbitration.

RECENT CANADIAN CASE LAW

The commitment of Canadian courts to the tenets of the Model Law and the New York Convention has been confirmed by recent case law. Significant recognition and enforcement decisions were rendered in the Provinces of British Columbia and Ontario in 2014 and 2015 that clearly demonstrate the Canadian judiciary's respect for the integrity of the international arbitration process and the importance of deference to international arbitral tribunals. An ongoing enforcement saga in the Province of Ontario will continue to provide

Canadian courts with an opportunity to uphold the principles of the Model Law and New York Convention. These cases are summarised below.

Assam Co India Ltd V Canoro Resources Ltd

In *Assam Co India Ltd v Canoro Resources Ltd*[3] *(Assam v Canoro*), the Supreme Court of British Columbia dismissed allegations of procedural unfairness and violations of public policy, holding that arbitral creditors who decide not to defend arbitral proceedings will not be permitted to re-litigate the same issues that were before the tribunal.

The parties had entered into a joint operating agreement (JOA) in respect of an oilfield in India, and a dispute arose when Canoro sought to transfer 53 per cent of their shares to Mass Financial despite a right of first refusal clause in the JOA.

Assam invoked the arbitration agreement in the parties' contract, and proceeded to appoint arbitrators according to that agreement, including exercising its right unilaterally to appoint the third arbitrator. Canoro raised an objection to the tribunal with respect to Assam's appointment of the third arbitrator and petitioned the Supreme Court of India for similar relief. However, before a determination was made in either venue, Canoro advised its counsel not to appear on its behalf, and from that point onwards, ceased participating in the proceedings.

On 21 November 2011, the arbitral tribunal issued a final award against Canoro which entitled Assam to relief including the shares wrongfully sold to Mass, Canoro's interest in the oilfield, and US$32 million. Assam sought to enforce the award in British Columbia. Canoro resisted enforcement on the basis of subsections 36(1)(a)(iii) (inability to present a party's case), (v) (improper composition of the tribunal), and 36(1)(b)(ii) (public policy) of the ICAA, arguing that that it was 'not given an opportunity to be heard contrary to the basic principles of natural justice and procedural fairness' and was 'forced to withdraw as, given the circumstances surrounding the arbitration, it had no or little chance to receive a fair hearing'.

In rejecting Canoro's arguments and enforcing the award, the Supreme Court of British Columbia emphasised the limited scope for judicial intervention in the Model Law, and noted that concerns of comity and respect for the capacity of foreign tribunals necessitate a high degree of deference to the decisions of arbitrators. The court also referred to ***CEIR v Yeap***, confirming that the 'Court is generally not empowered to scrutinise the arbitrator's findings on matters of jurisdiction but rather it should accept the arbitrator's decision on its face and ought not go behind it'.

The court soundly rejected Canoro's argument that it had not had a chance to present its case, holding that:

Canoro took a high risk strategic decision when it opted to abandon both its petition in the Supreme Court of India and its further participation in the arbitration. Having done so, it now seeks to re-litigate before this Court the same objections raised in India, labelling them as 'triable issues'...Canoro is not entitled to re-litigate its case in British Columbia. It could have and should have pursued the procedural and legal options it had available to it in India. It did not do so and it must live with the consequences.

On the issue of public policy, the court emphasised that the scope of the exception only extends to situations in which enforcement of an award would offend

local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the party of the tribunal which could not be seen to be tolerated by our courts.

The final issue before the court was the effect of portions of the award that entitled Assam to acquire Canoro's shares, in light of Canoro having been dissolved for failing to file annual reports. Since the corporation no longer existed, it could not be ordered to transfer the shares to Assam. After canvassing authorities on the effect of dissolution on an ongoing dispute, the court concluded that proceedings may continue against a company despite dissolution, and judgment may be obtained against a dissolved company. Recognising that there would be practical obstacles in implementing a share transfer, the court nevertheless recognised the award and granted leave to Assam to apply for approval of a mechanism by which any difficulties that may arise in enforcing the award could be overcome.

Sociedade De Fomento Industrial Private Limited V Pakistan Steel Mills Corporation (Private) Ltd

In *Sociedade de Fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Ltd*[5] *(SFI v PSM)*, the Court of Appeal for British Columbia addressed the rights of creditors to obtain interim relief in aid of arbitration, and confirmed that under the New York Convention a claimant is not obligated to seek enforcement of an award in the debtor's home country before seeking enforcement in a foreign jurisdiction.

SFI v PSM involved an application for a ***Mareva*** injunction to prevent the respondent from disposing of assets. In this case, SFI had already been granted a final arbitral award in an ICC arbitration (the Final Award), and sought a freezing order in advance of recognition and enforcement proceedings in British Columbia.

The Final Award was granted in favour of SFI in June 2010. After ten months of non-payment, SFI learned that PSM had purchased three shipments of coal from a company in British Columbia, the second of which was scheduled to depart British Columbia by sea in or around May 2011. PSM applied for, and was granted, a ***Mareva*** injunction on 21 April 2011, preventing the vessel from departing British Columbia and restraining PSM from disposing of the coal. As a condition of the injunction, PSM agreed to indemnify the third-party charter for any losses sustained as a result of the order.

After the Final Award was recognised and enforced by the Supreme Court of British Columbia, SFI petitioned for reimbursement of amounts paid to the vessel charterer under the indemnity agreement and damages arising from PSM's efforts to collect on the award. PSM counterclaimed, asserting that the Mareva injunction had been wrongly granted and had caused PSM to suffer significant losses.

The lower court granted PSM's request and set aside the ***Mareva*** injunction, noting that ***Mareva*** injunctions were extraordinary and that the balance of convenience favoured PSM. The decision was based on the court's finding that SFI had failed to make full, frank, and fair disclosure of a material fact, ie, by not informing the court that it could seek to enforce the Final Award in Pakistan (PSM's home jurisdiction). In the opinion of the trial judge, the onus was on SFI to satisfy the court that the award could not be enforced in the debtor's home country before execution remedies could be sought in a jurisdiction with no connection to the parties or the dispute.

On appeal, SFI argued that it was entitled to both recognise and enforce its award in British Columbia regardless of whether it had first attempted to enforce it in Pakistan, emphasising the principles on which the New York Convention is based. As a result, SFI argued that it was entitled to the same array of execution remedies as any other judgment creditor.

The Court of Appeal agreed with SFI, concluding that the judge had erred in conducting a forum conveniens analysis to determine whether ordering a ***Mareva*** injunction was

appropriate. In rejecting this approach, the Court of Appeal acknowledged that the New York Convention requires domestic courts to recognise foreign awards as if they were rendered in British Columbia. According to provincial legislation, a real and substantial connection between British Columbia and the subject matter of the dispute is presumed to exist in proceedings to enforce foreign arbitral awards. The Court held that 'it would be illogical to ignore this presumed jurisdictional connection for interlocutory purposes, but recognize it for final judgment purposes.' This removed any doubt that SFI was entitled to seek enforcement of its award in British Columbia, along with all the practical execution remedies available to domestic judgment debtors, regardless of its connection to the province or its attempts to enforce the award elsewhere.

The court went on to hold that the trial judge's conclusions on the material non-disclosure issue were coloured by her 'erroneous conclusion that the onus was on the appellant to establish it could not enforce the award in Pakistan'. The correct approach, according to the Court of Appeal:

should have been directed more to the question of whether considering all the circumstances, it was just and convenient to grant the injunction. The judge's balance of convenience analysis ought to have taken into account the delay that would accompany enforcement proceedings in Pakistan, as well as the considerable doubt about the enforcement of that part of the award representing interest under Pakistani law.

In essence, the Court of Appeal held that the availability of enforcement proceedings elsewhere was a factor to be considered in the balance of convenience analysis for a *Mareva* injunction, but that under the New York Convention a party had no obligation to seek enforcement elsewhere as a precondition to seeking enforcement in British Columbia. The Court of Appeal then held that the balance of convenience weighed in favour of granting the injunction on the bases that: SFI's claim was strong, the scheduled departure of PSM's assets from the province was imminent, and PSM continued to refuse to pay SFI. Accordingly, SFI was entitled to reimbursement for any losses it suffered in attempting to execute on the Final Award.

Depo Traffic Facilities (Kunshan) Co V Vikeda International Logistics And Automotive Supply Ltd

In *Depo Traffic Facilities (Kunshan) Co v Vikeda International Logistics and Automotive Supply Ltd*,[6] the Ontario Superior Court of Justice confirmed that a tribunal's decision will be accorded significant deference. The court also reiterated the narrow grounds for refusing enforcement of an international arbitral award, and the permissive nature of articles 35 and 36 of the Model Law.

The underlying arbitral award was rendered by the Shanghai International Arbitration Commission in favour of Depo in 2013. The award compensated Depo for various moulds constructed for and delivered to Vikeda under various agreements. Vikeda had refused to pay for the moulds, accusing Depo of unreasonable prices and underhanded dealings with Chrysler, Vikeda's ultimate customer. The commission found that Vikeda had breached its agreements with Depo by failing to make timely payments and was liable for the full amount due.

Vikeda challenged enforcement of the award on three main bases. First, it claimed that had been deprived of the opportunity to present its case, contrary to article 36(1)(a)(ii) of the Model Law, because the commission had failed to consider its submissions on a defence of double recovery in a meaningful way. Second, Vikeda argued that the commission's failure to consider its defence amounted to a denial of natural justice that was contrary to public

policy. Thirdly, Vikeda asserted that some of Depo's claims were not properly submitted to arbitration.

The court affirmed that the objectives of international commercial arbitration legislation in Canada are:

• giving effect to the intentions of parties in choosing to submit to arbitration;

• facilitating predictability in the resolution of commercial disputes;

• fostering consistency between jurisdictions in the resolution of international commercial disputes; and

• encouraging the use of international commercial arbitration.

The court further recognised that the respondent bears the onus of establishing one of the grounds for refusing to enforce an arbitration award; the court then has residual discretion to enforce the award or refuse to recognise it.

On the issue of Vikeda's double recovery argument, the court held that article 36(1)(a)(ii) is only comprised of the right to notice and the ability to present one's case. It does not include a right to reasons or a right to have a defence considered in a 'meaningful and substantive' way. Although the commission did not provide detailed reasons on Vikeda's defence, it was clear they had been alive to it and there was no question that Vikeda had made thorough submissions during the hearing. The court concluded that to accept Vikeda's interpretation of article 36(1)(a)(ii) would expand the restrictive list of reasons to refuse enforcement and that such a result would be both unwise and improper.

The court applied a similar analysis to Vikeda's public policy defence, noting that the defence was exceptional and must be construed narrowly and in light of the overriding purpose of the New York Convention to encourage the recognition and enforcement of international commercial arbitration agreements. Citing ***Schreter v Gasmac***,[7] the court acknowledged that the public policy defence is only engaged when an award 'offends [the Province's] local principles of justice and fairness in a fundamental way'. Further, the court accepted that 'public policy' was not equivalent to a local political stance or international policy, but was instead comprised of fundamental notions of justice. Recognising that the commission had rejected Vikeda's arguments regarding double recovery, the court held that there was no basis on which to reopen the merits of the dispute on public policy grounds and no applicability of the public policy defence to the facts at bar.

Lastly, the court gave short shrift to Vikeda's jurisdictional argument, essentially upholding the principle of competence-competence by affirming that the commission was entitled to take jurisdiction of all aspects of the dispute based on its conclusions that the parties' agreements were valid and binding. The court also noted that Vikeda had failed to dispute the commission's jurisdiction at the hearing, and cautioned that it is impermissible for a party to split its case and raise a jurisdictional argument for the first time as a defence to enforcement. Accordingly, the court recogniaed and enforced Depo's award and granted costs against Vikeda.

Sanum Beteiligungsgesellschaft MbH V PDC Biological Health Group Corporation

In ***Sanum Beteiligungsgesellschaft MbH v PDC Biological Health Group Corporation***,[8] the Supreme Court of British Columbia confirmed that issues decided by an international arbitral tribunal are res judicata; parties will not be permitted to reopen the merits of a dispute in resisting enforcement of an arbitral award.

Sanum, a producer of homeopathic medicines, had an exclusive distribution agreement with PPS in the United States. Through a series of transactions, Sanum acquired PPS, then entered into a share purchase agreement with PDC by which PDC agreed to purchase PPS for C$4.3 million. When the parties' relationship broke down, Sanum terminated the distribution agreement and PDC refused to pay the balance of the purchase price. An arbitral tribunal in New York ruled in Sanum's favour, holding that the share purchase agreement was valid and enforceable, that PDC obtained control over PPS and had failed to pay the purchase price, and that Sanum had not breached either the distribution agreement or the share purchase agreement.

Sanum took a novel approach to recognition and enforcement proceedings, applying to strike PDC's response to its petition to enforce its award on the basis that PDC's defences constituted an abuse of process. This would permit Sanum's application to continue essentially undefended. PDC responded by arguing that it had an arguable defence to enforcement that required a trial on the merits.

PDC's primary defence was that the share purchase agreement was merely a draft and had never been a binding contract, making the arbitration clause unenforceable. PDC also argued that Sanum had breached the share purchase agreement, that the arbitrator had failed to consider its defences, and that enforcing the award would be contrary to public policy because the share purchase agreement was 'commercially absurd' (ie, resulted in a C$3 million windfall to Sanum). Further, PDC opposed Sanum's application on the basis that it had failed to provide a certified copy of the original arbitration agreement, pursuant to article 35(2) of the Model Law.

Sanum contended that all of PDC's arguments had been rejected by the tribunal. Relying on both the Model Law and local rules of civil procedure, Sanum submitted that it would be an abuse of process to allow PDC to reargue its case during the hearing of the enforcement petition.

The court began by recognising the mandatory nature of articles 35 and 36 of the Model Law. Adopting language from *Assam Company India Limited v Canoro Resources Ltd*, the court agreed that the following principles must be considered on applications to enforce international arbitral awards:

• Broad deference and respect is to be accorded to international arbitration tribunals;
• This Court is generally not empowered to scrutinize the arbitrator's findings on matters of jurisdiction but rather it should accept the arbitrator's decision on its face and ought not go behind it;
• It is not the role of the court on this type of application to consider the merits of a substantive issue that was the arbitrators' to decide;
• Nor is it proper for the respondent to try and re-litigate these issues here; if the respondent wanted to challenge the jurisdiction or composition of the arbitral tribunal or any of its decisions on the merits, the respondent ought to have taken steps to do so in another forum;
• The fact that the respondent's initial objections to the jurisdiction, composition or procedures of the arbitral tribunal were unsuccessful does not give rise to a basis for refusing recognition or enforcement of the arbitral award in this jurisdiction;
• The 'contrary to public policy' ground for refusing recognition or enforcement is to be narrowly construed and requires fundamental breaches of justice and fairness and conduct of a sort that could not be tolerated or condoned by our courts.

Accepting that PDC's only avenue for challenging the merits of the award were on appeal, the court concluded that for the purpose of the enforcement application, all issues considered by the tribunal were res judicata. Since the arbitrator had already ruled on the validity of the share purchase agreement, any attempt to reargue this or any ancillary point (ie, the jurisdiction

of the tribunal) was an abuse of the court's process. Similarly, the court dismissed PDC's arguments regarding public policy on the basis that its argument of 'commercial absurdity' had been rejected by the tribunal and could not be re-litigated.

Regarding the issue of Sanum's failure to file a certified copy of the original arbitration agreement, the court held that it had discretion to relieve Sanum of the requirement and would not prevent enforcement of Sanum's award on that basis alone.

In the result, the court struck PDC's pleadings, holding that:

...in light of the decisions of this court and others, about the mandatory nature of recognition and enforcement proceedings under the ICAA, it would be an abuse of the process of the court to allow PDC to reargue matters already considered and decided by the arbitrator. That is what PDC purports to do in its response and it should be struck.

Popack V Lipsyzc

In *Popack v Lipsyzc*,[10] the Ontario Superior Court of Justice confirmed that an arbitral award may be enforced despite non-compliance with the Model Law so long as neither party is unduly prejudiced.

After the parties' business relationship broke down, their dispute was referred to arbitration in a rabbinical court, through which Rabbi Schwei ordered Lipszyc to sell his interest in the business to Popack. Popack then alleged that the share purchase agreement was based on misrepresentations by Lipsyzc, which instigated a second dispute. Rabbi Schwei was unavailable to preside over the second dispute, and the parties agreed to the jurisdiction of an alternate rabbinical court.

During the second arbitration, Lipsyzc expressed to the tribunal that he wanted it to hear from Rabbi Schwei. Popack did not object. After hearings had concluded, the tribunal met with Rabbi Schwei on its own accord and without notice to or participation by either party. A month later, the tribunal ordered Lipsyzc to pay Popack C$400,000.

Eventually, the parties discovered the meeting, and Popack's counsel suggested that if the tribunal was going to consider Rabbi Schwei's evidence, there should be a full hearing. The tribunal responded by confirming that Rabbi Schwei's evidence had not affected its decision.

In applying to set aside the award pursuant to article 34 of the Model Law, Popack argued that the secret meeting between the tribunal and Rabbi Schwei violated the applicable notice requirements under the arbitration agreement and the Model Law, prevented Popack from presenting his case, and was contrary to Ontario public policy.

On a preliminary issue, the court held that the parties had not contracted out of article 34 of the Model Law, and in any event, would be prohibited from doing so in relation to any mandatory provision of the Model Law or in conflict with public policy.

In considering the merits of the application, the court acknowledged that the tribunal's failure to give notice of the meeting with Rabbi Schwei gave rise to grounds to set the award aside pursuant to article 34(2)(a)(iv) of the Model Law; the tribunal had failed to conduct the arbitration in accordance with the notice requirements in the arbitration agreement. Without expressly considering Popack's other arguments, the court noted that all three were based on the same concerns regarding the potential unfairness of the private meeting with Rabbi Schwei.

The court noted that article 34 is discretionary. Although Popack had satisfied the prerequisites for setting aside the award, the court was not mandated to do so. The court

recognised that the seriousness of the breach was a factor to consider in exercising its discretion, as was the general principle militating against private interviews with witnesses absent express or implied authority.

Mandating in favour of enforcing the award, the Court acknowledged that the tribunal had not interviewed Rabbi Schwei on its own initiative; it had done so in response to an unopposed request by one of the parties. In addition, Rabbi Schwei was a neutral witness. Since the arbitration agreement precluded any transcript or reasons for the tribunal's decision, the Court had little information on which to conclude that Rabbi Schwei's evidence might have prejudiced either side. Further, the letter sent by Popack's counsel, which made ex parte submissions to the tribunal and including only a qualified request for a hearing, reinforced a refusal to grant the application. On the other hand, the court found that the actual prejudice that would arise from setting aside the award was considerable because a material witness had died and his evidence was unrecorded.

In weighing the evidence, the court dismissed the application to set aside the award, concluding that:

The breach by the Arbitral Tribunal, although significant, must be weighed against the other relevant factors discussed above including the actual prejudice that will result if the Award is set aside. Taking everything into consideration in the exercise of my discretion, I conclude that this is not an appropriate case to set aside the Award.

This case confirms Canadian courts' commitment to upholding the underlying objectives of the Model Law and New York Convention, even in the face of procedural breaches. It is clear that simply establishing grounds to set aside an award is insufficient to prevent enforcement. A party must also show that the prejudice in having the award enforced outweighs the prejudice associated with setting the award aside.

Stans Energy Corp V Kyrgyz Republic

Stans Energy Corp v Kyrgyz Republic is ongoing, and involves a myriad of complex legal and factual issues. Stans' application to enforce its arbitral award in Ontario is currently scheduled for 21 July 2015, but its efforts to obtain interim relief in Ontario and the Republic's attempts to set aside the award bear mention.

Stans, a publicly traded Ontario company, owned a mining licence in the Republic which was cancelled in 2012. Alleging that the cancellation of its licence amounted to unlawful expropriation and violated its rights as an investor under the Moscow Convention, Stans initiated arbitration in the Arbitration Court of the Moscow Chamber of Commerce and Industry (MCCI). The Republic disputed the tribunal's jurisdiction from the beginning and refused to participate in hearings. The tribunal rejected the Republic's jurisdictional arguments and issued a C$118 million award in favour of Stans.

The Republic commenced two simultaneous jurisdictional challenges, one in the Economic Court of the Commonwealth of Independent States (CIS Court), which has sole authority under the Moscow Convention to determine jurisdictional disputes, and the other in the Moscow State Court to set the award against it aside. The Republic's application to set aside the award was dismissed and the Republic appealed. By the time the Federal Arbitration Court heard the appeal, the CIS Court's decision had been released. The decision found that MCCI was not a competent court to decide matters under the Moscow Convention. As such, the Federal Arbitration Court ordered the Moscow State Court to reconsider its decision de novo.

In the meantime, Stans had commenced enforcement proceedings in Ontario. On 10 October 2014, Penny J granted Stans a ***Mareva*** injunction, freezing shares in an Ontario company in which the Republic held an equitable interest. The Republic had publicly announced that it had no intention of satisfying Stans' award and was planning on moving the shares outside of the jurisdiction, leaving Stans with no assets to collect on. Penny J held that, based on the mandatory nature of the Model Law and New York Convention, Stans had a strong prima facie case for enforcement and was entitled to injunctive relief.

Ten days later, Stans applied to extend the ***Mareva*** injunction indefinitely. The Republic argued that Stans had failed to make full and frank disclosure on the original ex parte application by not providing Penny J with a translated copy of the CIS Court's decision and disclosing that the award might be set aside in Russia. Newbould J acknowledged the lack of translation, but held that Stans had made it sufficiently clear that the Republic disputed the tribunal's jurisdiction. As a result, the injunction was extended.[11] The Republic was granted leave to appeal.[12]

By the time the Ontario Divisional Court heard Stans' appeal, the Moscow State Court had rendered its decision. On reconsideration, Stans' award was set aside on the basis that the MCCI did not have jurisdiction over the dispute, pursuant to the CIS Court's ruling.

On appealing Newbould J's decision to extend the ***Mareva*** injunction against it, the Republic again argued that Stans had failed to make full and frank disclosure to the court by failing to provide an accurate depiction of the CIS Court's decision and its effect on the Russian proceedings. Further, after having the Moscow State Court's decision to set the award aside admitted as fresh evidence, the Republic submitted that the injunction had to be set aside since the foundation for the relief was now absent.

The Court agreed that the Moscow State Court's ruling made it necessary to set aside Stans' injunction. Relying on article 36(1)(v) of the Model Law, the Court implied that since the award had been set aside, there could be no strong prima facie case for enforcement on which to grant the injunction.

On the issue of full and frank disclosure, the Divisional Court held that Stans had not met its duty. In addition to failing to provide a translation of the CIS Court decision, Stans had failed to disclose that the CIS Court had decided that MCCI did not have jurisdiction and that the Federal Arbitration Court had remitted the case to the Moscow State Court for reconsideration on the basis of the CIS Court decision. In setting the injunction aside, the Divisional Court held that these issues were clearly relevant to whether Stans had a strong prima facie case for enforcing its award.[13]

As mentioned, Stans' application to enforce its award is scheduled for July 2015; however, given the Divisional Court's holding on whether Stans had a strong prima facie case for enforcement, it appears that its success may be in doubt. Further, the Republic is now at liberty to move its only asset in Ontario (the shares) out of the jurisdiction, removing any impetus for Stans to have the award enforced in Canada. Nevertheless, as is clear in the preceding cases, Ontario courts retain discretion to enforce Stan's award notwithstanding the Moscow State Court's decision to set it aside. The upcoming decision is likely to be a landmark decision in Canadian arbitration law.

Collectively, these cases demonstrate the proclivity of Canadian courts to respect the conclusions of arbitral tribunals and refuse to allow arbitral debtors to reargue the merits of their case in enforcement proceedings.

CONCLUSION

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Secondly, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

The authors are grateful for the valuable assistance of Kalie N McCrystal (an associate with Borden Ladner Gervais LLP).

Endnotes

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Cayman Islands

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Summary

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SUMMARY

The Arbitration Law 2012 (the Law) provides a modern statutory regime based largely on the UNCITRAL Model Law and the English Arbitration Act (1996 Act).

The enforcement in the Cayman Islands of agreements to arbitrate in countries that are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and arbitral awards made in such countries, remain largely governed by the Foreign Arbitral Awards Enforcement Law (the Foreign Awards Law). That legislation incorporates the provisions of the New York Convention relating to such matters into Cayman Islands law.

KEY FEATURES OF THE LAW

The Law is founded upon three main principles:

• the fair resolution of disputes by an impartial tribunal without undue delay or expense;

• party freedom to agree how their disputes are resolved, subject only to safeguards deemed necessary in the public interest; and

• limits on the scope for court intervention in arbitration proceedings.

The Law applies to all arbitrations where the seat of the arbitration is the Cayman Islands (regardless of where the parties are based) and governs the conduct of the arbitration, challenges in the Cayman Islands courts and the enforcement of Cayman Islands arbitral awards within the jurisdiction.

An arbitral tribunal appointed under the Law has wide powers and is essentially able to award any interim or final remedy that a court could have granted if the dispute in question had been the subject of court proceedings. The Law gives the parties the freedom to tailor the arbitral proceedings according to their needs, but also provides default provisions that apply in the absence of agreement. There are certain mandatory provisions of the Law designed to protect the integrity of the arbitration process; for example, by ensuring that the tribunal maintains its impartiality throughout the arbitration and does not have any conflicts of interest. The Law expressly recognises that arbitration proceedings are to be confidential and the limited grounds set out in the Law, upon which an arbitral award may be challenged in the Cayman Islands courts reflect the grounds in the New York Convention.

An arbitration agreement may be in the form of an arbitration clause in a contract or a separate agreement (section 4(1)). An arbitration agreement must be in writing and contained in a document signed by the parties or an exchange of letters, facsimile, telegrams, electronic communications or other communications that provide a record of the agreement (section 4(3)). An arbitration agreement will also be deemed to exist where a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances calling for a reply and the assertion is not denied (section 4(4)).

JURISDICTION

The Law does not impose any restrictions on the types of dispute that may be referred to arbitration. Section 26(1) provides that any dispute that the parties have agreed to submit to arbitration may be determined by arbitration unless the arbitration agreement is contrary to public policy or the dispute is not capable of determination by arbitration under any other law of the Cayman Islands.

One example relevant to the Cayman Islands financial services industry, particularly in relation to investment funds, is the winding-up of companies and partnerships. In ***Cybernaut Growth Fund, LP*** (Grand Court, Jones J, 23 July 2013) a petition to wind up and liquidate an investment fund (on just and equitable grounds) had been filed. The fund attempted to strike out or stay the petition on the basis that arbitration proceedings had been commenced in New York pursuant to an arbitration clause in the fund's partnership agreement. The Grand Court concluded that a petition to wind up a company and appoint a qualified insolvency practitioner as liquidator was a dispute that was non-arbitrable. The actual winding up order, being an order by which third parties would be bound, was beyond the scope of an arbitrator's contractual powers. Furthermore, the identity of the appointed liquidators was a matter of public interest, particularly if the business in question was regulated (as is often the case for investment funds registered in the Cayman Islands). Winding-up orders, supervision orders and orders for the appointment or removal of liquidators all fall within the exclusive jurisdiction of the Court. The Grand Court took the opportunity to consider the English Court of Appeal decision in ***Fulham Football Club (1987) Ltd v Richards*** [2012] Ch 333, in which Patten LJ suggested that an arbitrator could exercise considerable jurisdiction in relation to winding up disputes. The Grand Court expressed the view that this principle should be confined to cases in which the winding up petition includes a discreet claim between the parties to the arbitration agreement, and where the petition includes matters which could be disposed of as preliminary issues. Several recent English decisions have considered the interplay between the courts' exclusive jurisdiction and arbitration and so this issue remains topical. Practitioners in the Cayman Islands will continue to monitor development in this area with interest.

Where the respondent wishes to raise objections regarding the tribunal's jurisdiction, he must first do so with the tribunal. Under section 27(1), the arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement. A party may also resist enforcement in the Cayman Islands of an award made here on the ground that the tribunal lacked jurisdiction (section 72(3)).

Under section 9, where a party to an arbitration agreement institutes court proceedings in respect of any matter falling within the arbitration agreement, the other party to the arbitration agreement may apply to the court for an order staying the proceedings. The court must then grant a stay unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. A party that takes a step in the court proceedings to answer the substantive claim loses its right to apply for a stay of the proceedings (section 9(1)).

The court is also required to grant a stay in favour of foreign arbitral proceedings pursuant to section 4 of the Foreign Awards Law. This provision has been applied by the Cayman Islands courts (for example, ***INEC Engineering Company v Ramoil Holding Company*** (1997 CILR 230) and ***Cybernaut Growth Fund, LP***).

The law of the Cayman Islands does not allow an arbitral tribunal to assume jurisdiction over individuals or entities that are not parties to an arbitration agreement. In ***Unilever plc v ABC International*** (2008 CILR 87), the court granted injunctive relief restraining the defendant from initiating arbitration proceedings against various companies that had owned the entity, which was a party to an arbitration agreement with the defendant over a period of time. The court stated that the group enterprise theory is not a doctrine recognised by Cayman Islands law.

LIMITATION

Section 14(1) provides that the Limitation Law (1996 Revision) applies to arbitration proceedings as it applies to court proceedings. Under the Limitation Law, contract claims must be commenced within six years of the breach of contract and tortious claims must be commenced within six years of the date on which damage is suffered. Claims for the recovery of land must be commenced within 12 years of the cause of action accruing.

CONFLICTS OF LAWS

The Cayman Islands courts apply common law conflict of law rules. The choice of law rule for a contract provides that a contract is governed by its proper law which, in the absence of an express or implied choice by the parties, is the law with which the contract has its closest and most real connection.

The application of foreign law in arbitral proceedings in the Cayman Islands is not possible to the extent that such law is contrary to public policy or to the provisions of any statute that have overriding effect.

SELECTION OF ARBITRATORS

The Law does not impose any limits on the parties' freedom to select arbitrators. The parties are free to agree on the number of arbitrators, the procedure for their appointment and the qualifications that the arbitrators must possess (sections 15(1) and 16(1)).

Section 16(2) sets out the procedure to be followed for appointing the tribunal where the parties have not agreed on a procedure or chosen a set of institutional rules that provides a procedure for the appointment of the tribunal. In an arbitration with a sole arbitrator, the arbitrator is appointed by a party to the agreement making a request to the person or appointing authority chosen by the parties; or, if no such choice has been made, to the person or authority designated by the court (the appointing authority). In an arbitration with two or more arbitrators, an odd number must be appointed by the parties either each appointing an arbitrator and then jointly agreeing to the appointment of a subsequent arbitrator, or jointly agreeing to the appointment of an odd number of arbitrators.

Where a party fails to appoint an arbitrator – or if the parties fail to agree on the appointment of an additional arbitrator within 30 days of a request to do so – the appointment is to be made by the appointing authority (section 16(3)). An application may also be made to the appointing authority for assistance with the appointment of the tribunal where one party fails to act in accordance with any agreed procedures, or the parties cannot reach agreement.

The matters to be taken into account by the appointing authority in the selection of an arbitrator include the subject-matter of the arbitration, the availability of any proposed arbitrator and any qualifications required by the arbitration agreement or otherwise by the parties. The appointing authority must also have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator (section 16(5)).

The court has only a limited role to play in the appointment process. Its function consists of designating an appointing authority where none has been chosen by the parties rather than making appointments directly.

Sections 18(1) and 18(2) provide that, both before and during his appointment, an arbitrator is under an obligation to disclose any circumstances that might reasonably compromise his impartiality or independence.

(a) Pursuant to section 18(3) a challenge may be brought against an arbitrator where:
(i) circumstances exist that give rise to justifiable doubts as to his impartiality or independence; or
(ii) he does not possess the qualifications to which the parties have agreed.

A party may not bring a challenge against an arbitrator which he or she appointed, or participated in the appointment of, unless the grounds for the challenge became known to the party after the appointment was made (section 18(4)). These provisions mirror article 12 of the UNCITRAL Model Law.

PROCEDURE

Parties may tailor the rules of procedure to meet their needs, subject to the mandatory provisions of the Law. The duties of the tribunal in conducting arbitral proceedings are set out in section 28 and cannot be altered by agreement. The tribunal must act fairly and impartially, allow each party a reasonable opportunity to present his or her case and conduct the arbitration without unnecessary delay or expense.

The matters that the parties may agree upon – or failing agreement, which are to be determined by the tribunal in accordance with the Law – include the seat of the arbitration (section 30(1)), the language of the arbitration (section 31(1)) and the timetable for the submission of statements of claim and defence (section 32(1)).

The tribunal must determine whether to hold an oral hearing for the presentation of evidence (section 33(1)(a)). Unless the parties have agreed that no such hearing will be held, the tribunal must hold a hearing if requested by a party (section 33(2)). The parties must be given sufficient notice in advance of any hearing or any meeting of the tribunal for the purposes of inspecting documents, goods or any other property (section 33(3)).

Section 34 provides that, unless otherwise agreed, a party to an arbitration agreement may be represented in arbitral proceedings by a legal practitioner admitted to practise in the Cayman Islands or by any other person chosen by him. This would include a lawyer admitted to practise outside the Cayman Islands. Any lawyer coming to the Cayman Islands to participate in arbitration proceedings would need to obtain a temporary work permit from the Cayman Islands government.

Section 25(1) provides that an arbitrator is not liable for any consequences or costs resulting from any negligent acts or omissions in his capacity as arbitrator, or any mistakes of law, fact or procedure in the course of the arbitration proceedings.

INTERIM REMEDIES

Section 43 gives the court certain powers that are exercisable in support of arbitral proceedings, including:

• in relation to security for costs;

• disclosure;

• compelling a witness to attend the court and give evidence or produce documents; and

• the power to secure the amount in dispute and to prevent the dissipation of assets against which an award may be enforced and the power to grant interim injunctions.

In urgent cases, the court may grant orders preserving evidence or assets on the application of a party, or proposed party, to arbitral proceedings. In non-urgent cases, the court may also grant other forms of relief, but only where the application has been made with the permission of the tribunal or the written agreement of the other parties to the arbitral proceedings. In either case, the court may only act if and to the extent that the

tribunal has no power or is unable, for the time being, to act effectively.

All directions given by the arbitral tribunal may, with the permission of the court, be enforceable in the same manner as if they were orders made by the court. Judgment may also be entered in the terms of the directions given by the tribunal (section 38(5)) where permission is given.

Part VIII of the Law contains detailed provisions relating to the granting of interim relief by an arbitral tribunal based on articles 17 and 17A-17I of the UNCITRAL Model Law as amended in 2006. The tribunal need not seek assistance from the court before granting interim relief.

Under section 44, in the absence of an agreement to the contrary, the tribunal may grant interim relief prior to the issue of its award requiring a party to:

• maintain or restore the original position of the other party pending determination of the dispute;

• take action that would prevent or refrain from action that would cause harm or prejudice to the arbitral process;

• provide a means of preserving assets out of which the tribunal's award may be satisfied; or

• preserve evidence that may be relevant and material to the dispute.

Section 54 provides that the court is to have the same power of issuing interim measures in relation to arbitration proceedings, irrespective of whether the seat of the arbitration is the Cayman Islands, as it has in relation to court proceedings. The court is therefore able to grant injunctive and other relief similar to that which the tribunal may grant.

In light of the principle of non-intervention by the court in arbitration proceedings set out in section 3(c), the court may only be willing to grant interim relief where the tribunal is unable to act itself. Instances such as this may include where the tribunal has not yet been appointed or where relief is sought against a person who is not a party to the arbitration agreement. It is expected that the courts will follow the approach adopted by the English courts under the 1996 Act of recognising the arbitral tribunal as having primary responsibility for granting interim relief and only acting where the tribunal is unable to do so.

The Cayman Islands courts have, in the past, been willing to grant anti-suit injunctions to restrain foreign court proceedings where the Cayman Islands is the natural forum for the action and the commencement or continuation of the foreign proceedings is regarded as vexatious or oppressive (see, for example, ***In re Cotorro Trust*** (1997 CILR 1)).

The Cayman Islands' courts are not bound by the principle established by the European Court of Justice in ***Allianz SpA v West Tankers Inc*** (Case C-185/07), whereby courts in the member states of the EU may not issue anti-suit injunctions to restrain proceedings in other EU member states commenced in breach of an arbitration agreement. Accordingly, it would be open to the Cayman Islands courts to restrain foreign proceedings brought in breach of an arbitration agreement whether the proceedings have been commenced in the courts of a member state of the EU or another country.

EVIDENCE

Unless the parties agree otherwise, the tribunal may conduct the arbitration in such manner as it considers appropriate. This includes the power to determine the admissibility, relevance, materiality and weight of any evidence (sections 29(2) and (3)). The parties may agree on whether they wish the tribunal to apply rules of evidence in the arbitration, or in the absence of such an agreement, the tribunal must determine whether to apply rules of evidence, such as under the International Bar Association Rules on the Taking of Evidence in International Arbitration. To the extent that the parties or the tribunal wish to have regard to the rules of evidence that apply in court proceedings in the Cayman Islands, the Grand Court Rules are not dissimilar to the former Rules of the Supreme Court in force in England prior to the commencement of the Civil Procedure Rules in 1999.

The parties are free to agree on the extent to which the tribunal is to have the power to order any party to provide disclosure of documents. In the absence of an agreement, the tribunal will have such power to make disclosure orders as it considers appropriate (section 38(2)(b)).

CONTENT OF AWARD

The requirements as to the form and content of all arbitral awards are set out in section 63. The arbitral award must be made in writing and signed by the tribunal. The award must state the reasons upon which it is based, unless the parties have agreed that reasons are not to be stated, or the award is made for the purpose of recording a settlement that they have reached.

Where the tribunal consists of two or more arbitrators, the majority may sign the award if the reason for any arbitrator's signature being omitted is stated in the award. A single signature by each arbitrator on the final page is sufficient. Signed originals of the award must be provided to each party. The date of the award and seat of the arbitration must also be stated in the award.

Unless otherwise agreed, the tribunal may make more than one award at different times during the arbitral proceedings on different aspects of the matters to be determined. Such awards could include an award determining particular facts, an award relating to the existence or non-existence of particular conditions or an award relating to compliance or non-compliance with a particular rule, standard or quality. Where the tribunal makes such an award, it must specify the issue, claim or part of a claim that is the subject matter of the award (section 56).

The Law does not impose a time limit on the tribunal for the making of its award but allows the parties to agree to do so (section 59).

CHALLENGING AN AWARD

There are two grounds upon which a party may challenge an arbitral award made in the Cayman Islands.

First, a party may apply to the Grand Court of the Cayman Islands under section 75 to set aside an award on the grounds that:

• a party to the arbitration agreement was under an incapacity or placed under duress to enter into an arbitration agreement;

• the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereof, under Cayman Islands law;

• the party making the application was not given proper notice of the appointment of the tribunal or the arbitration proceedings or was unable to present his case;

• the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

• the composition of the tribunal was not in accordance with the parties' agreement or the Law;

• the making of the award was affected by fraud; or

• a breach of the rules of natural justice occurred in connection with the making of the award.

The court may also set aside an award if it finds that the subject matter of the dispute is not capable of settlement by arbitration, or that the award is contrary to public policy.

Second, unless otherwise agreed, a party may, with the permission of the Grand Court, appeal on a question of law arising out of the arbitral award under section 76. Before it grants permission, the court must be satisfied that:

• the determination of the question will substantially affect the rights of one or more of the parties;

• the question is one that the tribunal was asked to determine;

• on the basis of the tribunal's findings of fact, its decision on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and

• it is just and proper for the court to determine the question in spite of the parties' agreement to arbitrate (section 76(4)).

On appeal, the court may confirm the award, vary the award, remit the award to the tribunal in whole or in part for reconsideration or, where the latter would be inappropriate, set aside the award in whole or in part (sections 76(7) and (9)).

The right to bring an appeal on a question of law under section 76 may be excluded by agreement between the parties but the right to bring an application to set aside an award under section 75 cannot.

The Law does not specify whether an application to set aside an award is to be determined by way of review or a rehearing, but the UK Supreme Court has determined that, in relation to the equivalent provision in the 1996 Act, the court is to conduct a rehearing on the question of the tribunal's jurisdiction (see ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*** [2011] 1 AC 763). This decision is likely to be influential in the Cayman Islands.

Before an application to set aside an award under section 75, or an appeal under section 76, may be brought, the party wishing to challenge the award must first have exhausted every available arbitral process of appeal or review (section 77(2)). The deadline for bringing an application to set aside an award or appeal is one month from the date of the award, or from the date on which the applicant or appellant was notified of the results of any arbitral process of review or appeal (section 77(3)).

The court's approach to granting security for costs to a party opposing a challenge to the award differs depending upon whether the challenge goes to the jurisdiction of the tribunal or an alleged irregularity affecting the tribunal or the arbitral proceedings other than a lack of jurisdiction. In the former case, the party seeking security must show that the challenge

to the jurisdiction of the tribunal is flimsy or lacking in substance to obtain security for its costs of opposing the challenge, but that requirement does not apply in the latter case (- *Appalachian Reins. (Bermuda) Ltd v Mangino* 2014 (1) CILR 152).

FOREIGN ARBITRAL AWARDS

The United Kingdom government extended the operation of the New York Convention to the Cayman Islands by way of a notification to the secretary general of the United Nations, which took effect on 24 February 1981.

The enforcement in the Cayman Islands of awards made in states which are parties to the New York Convention has been a straightforward exercise since the enactment of the Foreign Awards Law in 1975 and the Cayman Islands courts have readily enforced such awards under this legislation (see, for example, *In the Matter of Swiss Oil Corporation: InMar Maritima SA and Others v Republic of Gabon* (1988-89 CILR 277) and *Tek Technologies Corporation v Dockery* (2000 CILR 196)). The grounds for refusing enforcement set out in section 7 of the Foreign Awards Law match those in the New York Convention and are the same as those in section 103 of the English Arbitration Act 1996.

ENFORCEMENT

Under the Law and the Foreign Awards Law, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and where permission is given, judgment may be entered by the court in the same terms as the award (sections 72(1) and (2) of the Law and section 5 of the Foreign Awards Law).

The decision of the Privy Council in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] 1 All ER (Comm) 253, in which the court held that the principle of issue estoppel applies to arbitration awards in the same way as to court judgments, is highly likely to be followed in the Cayman Islands.

Accordingly, a party is precluded from contradicting the decision of an arbitral tribunal on any issue of fact or law that has been determined in a final and binding award in any subsequent arbitration or court proceedings between the same parties and any other parties claiming through them.

If leave to enforce the award is granted on the ex parte application of the party which succeeded in the arbitration, the defendant may apply to set aside the order enforcing the award,within 14 days of service of the order granting leave, or if the order is to be served out of the jurisdiction, within the time fixed by the court (*Globeop Financial Services LLC v Titan Capital Group III LP* 2014 (1) CILR 412). The Grand Court may adjourn the enforcement proceedings and may, on the application of any party seeking to enforce the award, order the other party to give security. This can include interim relief, such as a freezing injunction, in appropriate circumstances.

CONFIDENTIALITY

Section 81 provides that the tribunal shall conduct arbitral proceedings in private and confidentially. Subject to limited exceptions, any disclosure by the tribunal or another party of confidential information relating to the arbitration is actionable as a breach of an obligation of confidence, and the tribunal and all parties must take reasonable steps to prevent the unauthorised disclosure of confidential information by any third party involved in the arbitration proceedings.

The exceptions to the obligation of confidentiality in section 81 include where disclosure is:

• expressly or impliedly authorised;

• required in order to comply with any enactment or rule of law;

• reasonably considered as necessary to protect a party's lawful interests;

• in the public interest; or

• necessary in the interests of justice.

REMEDIES

The parties are free to agree on the remedies that the tribunal may grant (section 57(1)). Unless otherwise agreed, the tribunal may award any remedy or relief that could have been ordered by the Cayman Islands courts if the dispute had been the subject of civil proceedings before such courts (section 57(2)).

Punitive damages are not awarded by the Cayman Islands courts and so, in the absence of an agreement to confer such power on it, an arbitral tribunal would not be able to award punitive damages.

Under section 58, the tribunal may award interest calculated in the manner agreed by the parties or, where there is no agreement, in the manner determined by the tribunal. Interest may be awarded on the whole or any part of an amount which the tribunal orders to be paid, in respect of any period up to the date of the award. Interest may also be awarded on amounts that the tribunal orders to be paid, including pre-award interest and any award of arbitration expenses, from the date of the award up to the date of payment. Unless the tribunal directs otherwise, its award carries interest from the date of the award at the same rate as a judgment debt.

COSTS AND TAX

Unless a contrary intention is expressed, every arbitration agreement is deemed to include a provision that the costs of the arbitration shall be at the discretion of the tribunal (section 64(1)). If the tribunal does not make provision in its award with respect to the costs of the arbitration, any party may apply for a direction from the tribunal regarding such costs within 14 days of the delivery of the award, or such further time as the tribunal allows (section 64(2)). Costs will usually follow the event and the unsuccessful party will be ordered to pay the successful party's costs.

There are no income, capital gains, consumption or corporation taxes in the Cayman Islands, although stamp duty often applies to real estate transactions. Accordingly, it is unlikely that an arbitral award made in the Cayman Islands will have any local tax implications, unless it relates to the transfer of real estate or importation of goods into the Cayman Islands (in respect of which import duty is usually payable).

INVESTOR-STATE ARBITRATIONS

The United Kingdom extended the operation of the Washington Convention to the Cayman Islands with effect from 20 February 1967, pursuant to the Arbitration (International Investment Disputes) Act 1966 (Application to Colonies Etc.) Order 1967.

SUMMARY

Financial services institutions and professional advisers are now increasingly incorporating Cayman Islands arbitration clauses into their agreements.

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Colombia

Juan Camilo Fandiño-Bravo, **Juan Camilo Jiménez-Valencia** and **Alberto Zuleta-Londoño**

Cárdenas & Cárdenas Abogados

Summary

INTERIM MEASURES IN DOMESTIC ARBITRATION

INTERIM MEASURES IN INTERNATIONAL ARBITRATION

Prior to 12 October 2012, when Law 1563 of 2012 (the Arbitral Statute) came into force, Colombian arbitration law did not include a thorough and comprehensive regulation on interim measures in arbitral proceedings. Decree 2279 of 1989 constituted the legal framework for interim measures in domestic arbitration and such regime was limited to mirroring rules for interim measures in judicial proceedings. Law 315 of 1996, the scantly drafted international arbitration law that existed before the Arbitral Statute came into force, on the other hand, did not include any rules regarding interim measures in international arbitration proceedings seated in Colombia, arguably leaving the matter to the arbitration rules chosen by the parties but, in any event, failing to refer to one key aspect, which is the role of the courts in the enforcement of interim measures ordered by international arbitral tribunals.

In the light of such a background the enactment of the Arbitral Statute, which includes a clear and detailed regulation of interim measures in both domestic and international arbitration proceedings (a dualist arbitration law still exists in Colombia), constitutes a major makeover of the almost non-existent applicable legal regime in place prior to 2012. The aim of this article is thus to present an overview of the regime's major features, with a view of some of the challenges these rather novel legal rules have yet to face in the near future.

INTERIM MEASURES IN DOMESTIC ARBITRATION

Available Measures And Criteria For Ordering Them

With regard to interim measures in domestic arbitration proceedings, article 32 of the Arbitral Statute expressly refers to the rules contained in the Code of Civil Procedure, the General Code of Procedure and the Code of Administrative Proceedings and Administrative Contentious Procedure and states that the interim measures that may be ordered in domestic arbitrations are those that would be available to the parties if the case before the arbitration tribunal were being tried in court. The scope of the reference extends to the types of measures available, the conditions that need to be met for them to be granted and the procedure for their enforcement.

In general, interim measures in civil proceedings (different from collection proceedings – which allow the attachment and seizure of assets) and, thus, in domestic arbitrations, are limited to the registration of the complaint in the registrar's office and seizure of moveable assets when the proceedings relate to in rem rights. In tort and contractual liability procedures, available interim measures are limited to the registration of the complaint in the registrar's office where assets of the defendant are registered. Assets subject to registration in Colombia are real estate property, automobiles, motorcycles, ships and aircraft. After a first-instance ruling that is favourable to the plaintiff is rendered, such
plaintiff would be entitled to request the attachment and seizure of assets.

In contentious administrative proceedings (ie, judicial proceedings in which a state entity acts as a party), interim measures are more strictly regulated than in civil proceedings. Taking into account the nature of administrative proceedings that can be submitted to arbitration (some raise issues of objective arbitrability related to the powers – or lack thereof – of arbitral tribunals to annul administrative acts), the available interim measures in domestic arbitrations that are related to administrative matters (usually government contracts) are:

• the order to maintain the status quo or reestablish an existing situation;

• an order to suspend an administrative proceeding;

• an order to adopt an administrative decision, or the construction or demolition of a construction; and

• the issuance of orders to the parties, or the imposition of obligations on the parties.

In addition to the foregoing, article 32 of the Arbitral Statute contains a broad and general provision, which entitles domestic arbitration tribunals to order any other interim measure that is deemed reasonable to protect the right subject to controversy, prevent its violation, avoid damages, cease existing affectations or guarantee the effectiveness of the claims. These types of measures are referred to as innominate measures, as they are not specifically listed in the Arbitral Statute itself or in any of the procedural codes. This is a very broad power that is given to arbitration tribunals, which must be exercised within the purposes and standards provided for in the Arbitral Statute, explained below.

Innominate interim measures in domestic arbitration are to be based on the tribunal's analysis of:

• the interest of the requesting party on the order;

• the existence of a threat on the concerned right (periculum in mora);

• the likelihood of success on the merits of the case (fumus boni iuris); and

• the necessity, effectiveness and proportionality of the measure.

In any case, the arbitration tribunal is allowed to order a measure that is different and less burdensome than the one requested by the claimant, if it so deems appropriate. The arbitral tribunal may determine, sua sponte or upon a party's request, the duration, amendment or cessation of the interim measures. Finally, as a condition for the order of interim measures the claimant is required to grant security in an amount equivalent to the 20 per cent of the estimated claims, or any other sum, as determined by the arbitration tribunal, to guarantee the payment of the damages that may be caused by the performance of the measures.

When the measure that was requested by the claimant or ordered by the tribunal is of a monetary nature, respondent may request that such measure be removed, upon submission of a guarantee that would ensure compliance with a possible adverse ruling.

Enforcement

Interim measures ordered by domestic arbitral tribunals are binding on their recipients without the need to fulfil any special requirements or acquire any sort of court order given that abritrators in domestic arbitrations have the same powers as judges. Additionally, if the enforcement of the measure requires court assistance by a judicial authority in a judicial circuit other than the one where the arbitral tribunal is seated, the arbitral tribunal is expressly entitled to request such assistance to the competent court, which will then be obligated to provide it.

INTERIM MEASURES IN INTERNATIONAL ARBITRATION

Purpose Of The Interim Measures

The segment of the Arbitral Statute that refers to the power of the tribunal to order interim measures in international arbitration proceedings is based on the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), yet contains some differences which will be explained below. Interim relief is consequently defined as any temporary measure, whether in the form of an award or not, by which, at any time prior to the issuance of the final award, the arbitral panel orders a party to:

• maintain or restore the status quo pending determination of the dispute;

• take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm to the arbitration proceeding;

• provide a means of preserving assets; or

• preserve evidence.

Given the fact that the Arbitral Statute is fairly recent, case law regarding these issues has yet to develop. Therefore, we must draw on international experience to establish the scope of the powers of the arbitral tribunal under the Arbitral Statute. Regarding the status quo, some local courts have interpreted the term to mean 'the last peaceable state of affairs between the parties'. (UNCITRAL 2012 Digest of Case Law won the Model Law on International Commercial Arbitration, page 87.) Thus, interim measures could be sought to prevent the termination or suspension of an agreement or other potentially harmful conducts.

As to the second purpose, it is clear that the scope is wide enough for the parties to seek almost any form of interim relief as long as it has a link to the ultimate goal of preventing harm to the proceedings. For instance, parties could seek the arbitral tribunal to forbid public statements, prevent interference with contractual performance or property rights or to adopt specific conducts in order to prevent the proceedings from being harmed or disrupted.

Regarding the third purpose, it is clear that arbitral tribunals may 'provide a means of preserving assets out of which a subsequent award may be satisfied' . This interim relief will certainly reduce the claimant's risk of delay in the proceedings and is aimed at avoiding fraudulent divestitures of assets or the undue privilege to certain creditors, for example.

As per the general regime of interim measures of international arbitrations seated in Colombia, it is important to bear in mind that;

• except when otherwise agreed by the parties, the arbitral tribunal may grant interim relief requested by any of the parties in the dispute;

• there is no provision regarding emergency arbitrators;

• arbitration tribunals may order a security in connection with the interim measure issued; and

• interim relief may be granted inaudita pars via a preliminary order if the arbitration panel considers that prior disclosure to the party against whom it is directed risks frustrating the measure.

Following we will refer to perhaps the most important issue for litigators and arbitrators, which is that of the conditions upon which an arbitration tribunal may order interim relief. The Arbitral Statute in this regard differs significantly from the UNCITRAL Model Law, as we will now explain.

Conditions For Granting Interim Relief Under The Arbitral Statute

For the arbitral tribunal to grant interim relief, the Arbitral Statute demands that the measure meet the requirements of being adequate, pertinent, reasonable and timely.

The terms adequate and pertinent are not frequently linked to interim measures in Colombian law. Rather, they are concepts that are typically used in evidence law, a field to which we must refer in order to understand what the Arbitral Statute intended.

Adequacy in evidence law is the legal ability that a certain means of evidence may have to prove a given fact. Extrapolating this concept to interim measures, adequacy is the ability of

the measure requested to prevent the materialisation of the risk that the party requesting the measure seeks to avoid. This means that the first test for the viability of granting an interim measure in an international arbitration in Colombia is whether the order to be issued by the arbitral tribunal can, effectively, accomplish the end result which is sought by the rule.

Pertinence, on the other hand, in evidence law, is a logical liaison between the means of evidence and a given fact that is intended to be proved in the proceeding; hence pertinence must be understood as the suitable logical link between the purpose sought, and the relief requested. This means that the end result that is intended with the relief must be relevant and have a link to the controversy. Even if the measure is a suitable way to obtain the end that the party is seeking, that end cannot be irrelevant to the controversy.

In other words, adequacy should be understood as the ability of the interim measure to fulfil the purpose sought, while pertinence is the relevance that such purpose has to the case.

The term reasonable, on the other hand, has never been defined in the context of interim measures in Colombia. We feel, however, that the term is related to the possible damage that the interim measure can cause to the party against whom it is directed. This concept force arbitral tribunals to take into account the possible effect that their orders may have in terms of ensuring that they will not cause irreparable harm to one of the parties or to the controversy itself and its possibility of successful resolution by means of an arbitral award.

Finally, timeliness makes reference to the moment in which the interim measure is requested as compared to the moment in which the measure must be adopted for it to effectively serve its purpose. A measure cannot be requested to prevent a damage that has already occurred or that can only occur far off in the future.

Departure From The UNCITRAL Model Law

As stated above, the conditions for granting interim measure in Colombian international arbitration differ from those established in the UNCITRAL Model Law, which requires:
(i) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.
Even though the first of the conditions set forth in the UNCITRAL Model Law seems to resemble in substance some of those established in the Arbitral Statute, the second condition, the fumus boni iuris, is conspicuously absent from the Colombian Arbitral Statute. This is a significant difference between the Colombian regime of interim measures in international arbitration and the UNCITRAL Model Law, as well as those arbitration regimes that follow it.

The requirement – or lack thereof – of fumus boni iuris as a condition to granting interim measures is strongly debated by scholars and practitioners, as it requires the balancing of the need for arbitrators not to prejudge the controversy with the need to adopt measures during the proceeding in order to prevent irreparable harm from occurring. Colombian law seems to have sided with those who believe that the need to prevent certain situations to consummate during the proceedings should be reviewed with no regard to the likelihood of success of either party, as can be assumed at a particular moment of the controversy. This situation, in our view, generates a possible burden for parties who may have acted properly and are subject to an obligation imposed by an arbitration tribunal, before they have had a chance to present their case.

Enforcement

The provisions regarding the enforcement of interim measures in the Arbitral Statute are similar but not identical to those of the UNICTRAL Model Law. The Arbitral Statute emphasises that a recognition proceeding is not required for interim measures granted by an international arbitration panel under any circumstances, whether seated in Colombia or abroad. The interim relief granted by the tribunal is binding and its enforcement may be requested to the Colombian judicial authorities regardless of where the tribunal is seated (in Colombia or abroad). In this case, the competent authority must act as if it were enforcing a final decision issued by a Colombian judicial authority.

The grounds for a Colombian judicial authority to refuse the enforcement of the interim measures, at the request of the party against whom they are invoked, are:

• when the arbitration agreement is void;

• when such party was not notified of the initiation of the arbitral proceeding;

• when the decision regards a controversy that is not covered by the arbitration agreement;

• when the integration of the arbitral tribunal, or the arbitration proceeding did not adjust to the agreement or the law of the seat of the arbitration, if by this the party was not able to defend himself from the interim measures sought;

• if the security in connection with the interim measure issued by the arbitration panel has not been complied; and

• if the interim measure has been suspended or modified by the arbitration tribunal.

The court can also refuse the enforcement of the interim measure sua sponte when: according to Colombian law the controversy is not arbitrable; and if the execution of the interim measure is contrary to Colombian international public policy, ie, the set of the most basic and fundamental principles of Colombian juridical institutions such as due process, impartiality of the arbitral tribunal, good faith and prohibition to abuse of rights.

Preliminary Orders

Finally, the Arbitral Statute allows arbitral tribunals to issue preliminary orders, that is, decisions by the arbitration tribunal directing a party not to frustrate the purpose of an interim measure. The special conditions described above for the issuance of interim measures are also applicable to preliminary orders. Given that a preliminary order is granted inaudita pars, the arbitral tribunal must allow the party against whom the preliminary order is directed the possibility to exercise its rights, as soon as possible.

These orders will expire 30 days after the arbitral has tribunal granted them. However, the arbitral panel may ratify or modify the order through the issuance of an interim measure, once the other party against whom the preliminary order is directed has been able to present its case.

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Summary

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Costa Rica introduced alternative dispute resolution (ADR) mechanisms in the nineties through its judiciary, which recognised the need to offer more effective means of resolving disputes. Since then, arbitration has become an oft-used mechanism for dealing with commercial disputes. However, the potential of arbitration as an alternative to the traditional proceedings before local courts has not been completely realised. This is due in part to the fact that practitioners still instinctively utilise procedural litigation mechanisms instead of taking full advantage of the flexibility and efficiency that arbitration offers. That, however, is expected to change. The modern legal framework for international arbitration recently adopted by the Costa Rican Congress, which is virtually identical to the UNCITRAL Model Law (as amended in 2006) (the Model Law), provides an opportunity to introduce current arbitration practices to the local culture. Given that and other propitious conditions described in this article, Costa Rica is well placed to become a regional centre for international commercial cases.

After a sensible institutional reform in 1996, Costa Rica pursued a policy of treaty making in the area of international trade and international investment protections. It negotiated and ratified dozens of bilateral investment treaties (BITs) and free trade agreements (FTAs) with investment chapters (collectively, international investment agreements or IIAs), thus cementing the country's commitment to free trade and protection of foreign investment. In the nearly 20 years since then, Costa Rica has built a solid track record of compliance and observance of its obligations under those IIAs. In fact, Costa Rica has not been found to violate its obligations to accord fair and equitable treatment, full protection and security, most-favoured nation and national treatment. It has been ordered to pay compensation for expropriation only in two cases, both of which stemmed from measures that pursued environmental protection objectives.[1]

Section II below will provide a description of the legal framework and the relevant judicial decisions, as well as other aspects of international commercial arbitration in Costa Rica, such as logistics, services, and institutions. Section III will discuss the IIAs in force for Costa Rica and will review the country's track record as a respondent in investor-State dispute settlement proceedings. Both sections show that Costa Rica is an arbitration-friendly country.

THE INTERNATIONAL COMMERCIAL ARBITRATION REGIME IN COSTA RICA

Costa Rica keeps a 'dualistic' legal regime: it has a law that governs domestic arbitration, the Law on Alternative Dispute Resolution and Promotion of Social Peace of 4 December 1997 (ADR Law, or Law 7727), and a law that governs international arbitration, Law on International Commercial Arbitration of 25 May 2011 (International Arbitration Law or Law 8937). Between the time when the former came into force and when the latter became effective, the restrictions on language of the arbitration proceedings and the nationality of arbitrators found in the ADR Law were interpreted to apply to international cases.[2] Though this only affected a few cases, it hurt Costa Rica's reputation.

The International Arbitration Law eliminates these restrictions and includes no reference to the local Code of Civil Procedures, so this obstacle has been removed. The new framework provides a fertile ground in which to grow a modern arbitration practice in Costa Rica.

Legal Framework And Jurisprudence

Court decisions have been on balance positive for the development of arbitration.[3] The First Chamber of the Supreme Court[4] (the First Chamber) is the court in charge of matters regarding international commercial arbitration under Law 8937. Since it is the same as the court that has rendered decisions under Law 7727, it is expected that the pro-arbitration judicial policy will continue.

As a civil law country, the Costa Rican legal framework follows a hierarchy that gives weight to rules depending on the legal instrument where they are found. Thus, constitutional norms are the highest ranked, followed by international treaties and domestic legislation, in that order. Decrees and regulations implement laws, but this chapter does not deal with them.

Constitutional Right To Arbitration In Costa Rica

It is a constitutional right enshrined in article 43 of the Constitution of Costa Rica that all persons have the right to solve their economic disputes through arbitration. Law 7727 provides that 'public persons', including the state, may submit their disputes to arbitration.[5] The First Chamber has confirmed this numerous times. The capacity of the state and its entities to consent to arbitration therefore cannot be questioned, at least as a matter of principle.

Unlike in jurisdictions where the issue is debated,[6] the Costa Rican Supreme Court has held consistently that the constitutional remedy of ***amparo*** is not the appropriate means of dealing with alleged violations of due process in arbitral proceedings.[7]

Relevant International Legal Instruments In Force In Costa Rica

Costa Rica is a party to the United Nations Convention on the Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).[8]

Costa Rica is also a party to the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention).[9] Almost identical to the New York Convention, the Panama Convention also provides that arbitrators may be of any nationality,[10] and that when parties of countries that are party to the treaty have agreed to arbitration but not provided the means, the applicable default rules are those of the Inter-American Commission on Commercial Arbitration.[11] There are no reported cases where the Panama Convention has been applied in Costa Rica.

Costa Rica is a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention or Hague Convention).[12] The implementation of this Convention is the responsibility of the Ministry of Foreign Relations.-[13]

Law 8937 On International Commercial Arbitration

Law 8937 entered into force on 25 May 2011. As indicated above, that law is inspired by the UNCITRAL Model Law but departs from the Model Law in some notable ways. The next four sub-sections below will describe some of the key differences between Law 8937 and the Model Law.

Scope Of Application

Law 8937 includes a provision devoted to the scope of the subject matter of arbitration agreements. Article 37, which does not exist in the Model Law, provides that 'disputes regarding matters of free disposition and transaction, in conformity with the applicable civil

and commercial provisions, can be submitted to arbitration.'[14] Both Costa Rican doctrine and courts take a broad approach in terms of matters that can be resolved by arbitration and exclude only non-commercial matters, such as labour, criminal and family litigation, as well as bankruptcy and inheritance disputes.[15]

Another deviation from the Model Law in Law 8937 regarding its scope of application is that article 1 of the Law provides that it shall not apply to investor-state disputes regulated in international agreements.[16] Although at first sight it may seem to be a limitation when interpreted in the context of the law, it should not constitute a hindrance.[17]

The International Arbitration Law designates the First Chamber as the only court that may intervene in international arbitration proceedings, albeit in limited situations, such as enforcement of the arbitration agreement, constitution of the arbitral tribunal, and recognition of the award.[18] The novelty of Law 8937 as compared to the Model Law is that it adds that the First Chamber may delegate on lower judicial authorities matters regarding specific procedures.[19]

The Arbitration Agreement

The Fourth (Constitutional) Chamber of the Supreme Court has characterised arbitral agreements as 'contractual with procedural effects'[20] and has enforced valid arbitration agreements.

Although article 37 of Law 7727 recognises that the arbitrators determine their own competence,[21] in practice when a lawsuit is brought before a lower court first and subsequently the defendant moves to refer the case to arbitration, the lower court refers the validity of arbitration clause to the Supreme Court's First Chamber rather than to the arbitral tribunal.[22] The situation is different when the dispute is brought first to arbitration and then a party contests the arbitration agreement. In those cases, the First Chamber reviews arbitral awards regarding jurisdiction only after the arbitral tribunal has rendered its decision.[23]

Another feature of Law 8937 is that it opted for the requirement that the arbitration agreement be in writing. The First Chamber has held that the arbitration agreement must be expressly stated, rather than being tacit or implicit.

The First Chamber has held as well that the arbitration agreement or arbitral clause 'cannot encompass third parties by virtue of the principle of relativity of contracts'.[24] Nevertheless, non-signatories have been deemed to have consented to arbitration in cases of assignment,[25] group of 'economic interest',[26] and umbrella agreements, as regards related companies that enter into the contractual relationship subsequently.[27] On the other hand, the First Chamber has found that a clause is not enforceable to non-signatories in case of a bank trustee that was not part to the agreement that contained the arbitration clause.[28]

Finally, it is important to mention the judiciary's stance regarding multi-tiered clauses. The First Chamber has not enforced the first 'tier' of this type of clauses, which provide for means of dispute resolution as a condition precedent for arbitration, because they are by nature not compulsory. In essence, the First Chamber deems that ADR mechanisms that do not result in binding decisions should be kept voluntary.[29] Whether dispute adjudication boards will be considered to fit into the voluntary category remains to be seen.

The Arbitral Tribunal

The provisions of the International Arbitration Law devoted to the constitution of the arbitral tribunal follow the same spirit of the Model Law, which is respect for party autonomy (including the nationality of the arbitrators), the possibility of delegating the parties' will to an institution or a third party, and the requirement that the arbitrators be independent from the parties.

There is one deviation from the Model Law, which is that the default number of arbitrators under Law 8937 is one arbitrator whereas under the Model Law it is three. In addition, while parties are free to determine the number of arbitrators, Law 8937 requires an odd number, something that is not required expressly in the Model Law.[30]

Provisional Measures

By virtue of article 9 of Law 8937, parties who have entered into an arbitration agreement are free to seek provisional measures from competent state courts without that constituting an implicit waiver of the arbitral jurisdiction.

As regards the powers of the arbitral tribunal to order provisional measures, Law 8937 includes the sections of the Model Law introduced in 2006, including the power to issue preliminary orders. Unlike the Model Law, Law 8937 does not refer to the form that the provisional measure must take but it does require that it be reasoned.[31] There are no reported cases on enforcement of provisional measures ordered by arbitral tribunals under the International Arbitration Law.

The Proceedings

The provisions of Law 8937 that require party equality[32] and the freedom to agree on the procedure by which the arbitration shall be conducted[33] are relatively straightforward and are part and parcel of the international standard in international arbitration. Nevertheless, they may prove to be the most challenging aspect for practitioners in Costa Rica, given that they provide no specific rules or instructions, nor do they refer to national procedural norms.

In contrast, in domestic arbitration practitioners have become used to applying the Code of Civil Procedures for matters such as terms and deadlines, notifications, swearing in of the witnesses, and hearing experts.[34] Although article 39 of domestic arbitration Law 7727 provides for flexibility in the proceedings as well, that provision includes a reference to local procedural rules[35] in case of lacunae.[36] In practice, arbitrators interpret the concept of 'local procedural rules' to mean Code of Civil Procedures, and practitioners are used to following certain aspects of that code.

Another modification included in Law 8937 is article 38, which establishes that proceedings are confidential; this does not exist in the Model Law. That same provision further states that the award shall be public, save agreement by the parties to the contrary.[37]

The Arbitral Award

As mentioned, the award shall be public. The names of the arbitrators and counsel shall appear in the award, although the parties' names must be replaced with their initials. In practice, other than cases of setting aside or enforcement, awards are kept private, as there is no institution dedicated to publishing awards. In any case, parties are free to agree in the arbitration clause or any time during the proceedings that the award will be kept private.

Provisions regarding the form of the award, applicable law and the setting aside and enforcement of the award are identical to the Model Law. As compared to domestic

arbitration Law 7727, the main difference is that the ground for setting aside the award if it is rendered beyond the time limit is not included in Law 8937. An argument can be made, nonetheless, that such a ground still exists under article 34(2)(iv), according to which an award may be set aside if the proceedings were not carried out in accordance with the parties' agreement. Thus, on such an important aspect, practitioners can expect that the First Chamber's track record will remain along the same lines that it has traced for domestic cases. In general, they have coincided with what is considered standard in international arbitration.[38]

On this same subject, there is a provision of the Model Law that is replicated in the International Arbitration Law and that will surely call the attention of parties in Costa Rica. Article 34(4) establishes that the First Chamber:

(...) may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.'

Although it is arguable that Law 7727 authorises it to do so, the First Chamber has ordered arbitrators in several domestic cases to correct awards under the existing renvoi of Code of Civil Procedures, so it is likely that Costa Rican parties will seek to invoke this provision when facing challenges to awards favourable to their interests.

Readiness Of Institutions, Logistics And Human Resources In Costa Rica For The Development Of International Arbitration Cases

According to Law 7727, local arbitration institutions must be authorised by the Ministry of Justice to provide dispute resolution services. In Costa Rica, out of the arbitration centres that are authorised to provide such services, four are capable of managing international cases:

• Costa Rican Chamber of Commerce Centre of Conciliation and Arbitration (CCA);[39]

• US-Costa Rican Chamber of Commerce International Centre for Conciliation and Arbitration, AmCham (CICA);[40]

• Costa Rican Bar Centre of Arbitration and Mediation (CAM-CR);[41] and

• Centre of Conflict Resolution of the Federated Assocation of Engineers and Architects (CRC-CFIA).[42]

Outside of those institutions, parties are free to agree to conduct their international arbitration proceedings in accordance with the rules of international arbitration centres located outside Costa Rica, as well as ad hoc rules.

In terms of logistics, international hotel chains such as Intercontinental, Marriott and Holiday Inn provide appropriate hearing rooms and accommodations to hold arbitral hearings in San José. In addition, since local centres are prepared to record all hearings per the requirements of Law 7727, sound systems and other technology is available for those purposes. Also, San José has direct flights to and from other capital cities, such as Madrid, Washington DC, Newark, Houston, Dallas, Los Angeles, Lima, and Mexico City.[43]

In terms of human resources, most attorneys and professionals who are involved in arbitration are fully bilingual. Since several international and regional institutions have offices or seat in Costa Rica, such as the Inter-American Court of Human Rights and the United Nations High Commissioner for Refugees, skilled court reporters and professional interpreters and translators are readily found.

IIAS AND COSTA RICA'S TRACK RECORD IN INVESTOR-STATE DISPUTE SETTLEMENT

Costa Rica has been an active player in the multilateral trading system, particularly after the establishment of the World Trade Organization in 1995. As a small but prosperous country, Costa Rica certainly punches above its weight. Costa Rica is arguably the strongest democracy in Latin America, known in the international community for its political stability, strong institutions, rule of law and respect for international law. In the context of investor-state dispute settlement (ISDS), Costa Rica's conduct is consistent with that reputation. The paragraphs below outline Costa Rica's framework of IIAs and the country's track record as a respondent in ISDS proceedings.

Protection And Promotion Of Foreign Investment In Costa Rica Through IIAs

Since Costa Rica's establishment of its Ministry of Foreign Trade (COMEX) through congressional Law 7638 of 30 October 1996, the country has pursued a consistent and coherent policy of promoting and protecting international investment and international trade through treaties[44] and domestic legislation. Costa Rica is a party to 14 BITs that are currently in force, with Argentina (1997), Canada (1998), Chile (1996), Czech Republic (1998), France (1984), Germany (1994), Republic of Korea (2000), the Netherlands (1999), Paraguay (1998), Qatar (2010), Spain (1997), Switzerland (2000), the Republic of China (Taiwan) (1999) and Venezuela (1997). Costa Rica is also a party to nearly a dozen FTAs, several of which contain an investment chapter, including DR-CAFTA (2004), CARICOM (2004), Central America and Mexico (2011), EFTA and Panama (2013), Peru (2011), Singapore (2010) and Chile (1999). In addition, Costa Rica has negotiated and signed nearly a dozen other IIAs that are yet to enter into force, including most recently with the People's Republic of China (BIT, 2007), Colombia (FTA, 2013) and Central America and the EU (FTA, 2012).

Most of the IIAs that are currently in force for Costa Rica provide effective legal protections for foreign investors and their investments, including recourse to ISDS mechanisms in the form of international arbitration.[45] For example, the IIAs that Costa Rica has in place with states that are important sources of inward foreign investment (including the United States, Canada, Spain, Germany and the Netherlands) provide for rights to compensation for lawful and unlawful expropriation, fair and equitable treatment, full protection and security, most-favoured nation treatment, national treatment, and free transfers. Some of those IIAs (for example those with Spain, Germany and the Netherlands) also contain an 'observance of undertaking' or 'umbrella clause'.

In the event of an investment dispute with Costa Rica, most of the IIAs in force (including the DR-CAFTA and the BITs with Canada, Spain, and the Netherlands) offer foreign investors with qualifying investments the choice of international arbitration under the ICSID Convention and Arbitration Rules,[46] the ICSID Additional Facility Rules, and ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade law (UNCITRAL).[47]

Costa Rica's Track Record As A Respondent In Investor-state Dispute Settlement Proceedings

Costa Rica has been an active and, on the whole, a successful party in ISDS proceedings.[48] It has been a respondent state in 10[49] such proceedings, under various investment treaties, including three cases under the Costa Rica-Canada BIT, two cases under the DR-CAFTA, and two cases under the Costa Rica-Germany BIT. Of the 10 cases, five have concluded and five are still pending.[50]

Of the five concluded proceedings, Costa Rica was ordered to pay compensation to the claimant in only two proceedings.[51] One of those proceedings, ***Santa Elena***[52] was initiated with the essential purpose of determining the value of compensation. In the remaining three concluded proceedings, the claims were dismissed on jurisdiction,[53] dismissed on the merits[54] or discontinued.[55]

Six of the ten proceedings against Costa Rica were brought under the ICSID Convention and Arbitration Rules; two under the ICSID Additional Facility Rules and the remaining two (both pending) under the Arbitration Rules of UNCITRAL.

It is noteworthy that half of the registered cases against Costa Rica relate to government measures in connection with environmental protection. The claims made in the ***Marion Unglaube***,[56] ***Reinhard Hans Unglaube***,[57] and S***pence International Investments, LLC, Berkowitz et al v the Republic of Costa Rica*** (UNCITRAL Arbitral Tribunal, Case No. UNCT/13/2 (pending)) (***Spence International***) proceedings all relate to government measures to support the establishment of the Las Baulas National Park, an ecological national park hosting leatherback sea turtles on Costa Rica's Pacific coast. Similarly, in ***Santa Elena***, the compensation complaint related to Costa Rica's expropriation of land adjacent to the Santa Rosa National Park, in the interests of protecting flora and fauna, including stable environments for puma and jaguars and spawning grounds for sea turtles. The pending ***David Aven et al v Republic of Costa Rica*** (UNCITRAL Arbitral Tribunal) (***David Aven***) proceeding also concerns government conduct in connection with the protection of wetlands and forests on Costa Rica's Pacific coast.

These cases involving environmental protection measures present a mixed picture of success for the claimants. To date, Costa Rica has been ordered to pay a total sum of US$20,065,900.33 in compensation, comprising approximately 39 per cent of the amount claimed in ***Santa Elena***, and possibly an even lower percentage in the ***Marion Unglaube*** case.-[58]

No international tribunal to date has found Costa Rica to breach its obligations to accord fair and equitable treatment, full protection and security, most-favoured nation or national treatment to foreign investors and their investments.

We will now summarise the five concluded cases against Costa Rica, identify the five pending cases and consider Costa Rica's compliance record to date.

Concluded Cases

Compañía Del Desarrollo de Santa Elena S.A. v Republic of Costa Rica (Final Award) (ICSID Arbitral Tribunal, Case No ARB/96/01, 17 February 2000)

Claimant: Compañía del Desarrollo de Santa Elena, SA (a Costa Rican corporation with majority shareholders of US nationality)

Date registered: 15 May 1995

Investment agreement: N/A

Arbitration forum: ICSID

Status: Concluded (Final Award ordered Costa Rica to pay compensation to the claimant)
The tribunal observed that 'this is, at the end of the day, a case of expropriation in which the fundamental issue before the tribunal is the amount of compensation to be paid.'[59]

The investment that was the subject of the dispute was a property known as Santa Elena, located in Costa Rica's northwest Guanacaste Province consisting of over 30 kilometres of Pacific coastlines, numerous rivers, springs, valleys, forests and mountains, and a wide variety of flora and fauna. On 5 May 1978, Costa Rica issued an executive expropriation decree for Santa Elena to expand the adjacent Santa Rosa National Park with the stated objective of environmental conservation. In accordance with an appraisal of Santa Elena, Costa Rica proposed to pay the claimant US$1.9 million in compensation.

The claimant's request to ICSID, which was preceded by an agreement between the governments of the United States and Costa Rica to submit the case to the ICSID, did not object to the expropriation but complained about the amount of compensation owed to the claimant in connection with the expropriation. The claimant requested an award of US$41.2 million with interest and other amounts as fair and full compensation for the expropriation.

The tribunal ordered that Costa Rica pay the claimant the sum of US$16 million, which comprised principal and adjusted compound interest to the date of the award.[60] The tribunal held that compensation had to be determined according to the applicable principle of 'full compensation for the fair market value of the property'[61] with the fair market value of Santa Elena to be calculated by reference to its 'highest and best use'.[62] The tribunal decided that the relevant date that Santa Elena must be valued was the date of the expropriation decree, as that was the date that Santa Elena lost its practical and economic use.[63] The tribunal determined that the sum of US$4,150,000 constituted a reasonable and fair approximation of the value of Santa Elena at the date of its taking.[64]

In determining Santa Elena's fair market value, the tribunal proceeded by means of approximation based on the appraisals effected by the parties in 1978 and in accordance with several international arbitrations.[65] The tribunal ordered adjusted compound interest on the basis that although the claimant was able to use and exploit Santa Elena to a limited extent, it was unable to use Santa Elena for its planned tourism development.[66]

The tribunal ordered that each party bear its own legal costs and expenses and share equally in the costs and charges of the tribunal and the ICSID.[67]

Alasdair Ross Anderson et al v Republic of Costa Rica (Award) (ICSID Arbitral Tribunal (Additional Facility), Case No ARB (AF)/07/3, 19 May 2010)

Claimant: 137 individual Canadian nationals[68]

Date registered: 27 March 2007

Investment agreement: Canada - Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID Additional Facility

Status: Concluded (dismissed on jurisdiction)

The investments that were the subject of the dispute were deposits made by the claimants in a fraudulent Ponzi scheme that was operated by two Costa Rican nationals, Luis Enrique Villalobos Camacho and his brother Osvaldo Villalobos Camacho. Osvaldo Villalobos Camacho was convicted for aggravated fraud and illegal financial intermediation and was sentenced to 18 years in prison by the Costa Rican authorities. His brother, Luis Enrique Villalobos, absconded and remains a fugitive.

The claimants complained that Costa Rica, by failing to provide proper vigilance and government regulatory supervision over Costa Rica's financial system, injured their investments in violation of the BIT provisions regarding full protection and security, fair and equitable treatment, due process of law, and protection against expropriation.

The tribunal accepted the first objection to jurisdiction made by Costa Rica and dismissed the case for lack of jurisdiction 'ratione materiae'.[69] The tribunal found that the claimants did not qualify as investors pursuant to the BIT because they had failed to demonstrate that they owned or controlled an investment in the territory of Costa Rica in accordance with the laws of Costa Rica.[70] The transaction by which the claimants obtained ownership of their assets did not comply with the relevant law of the Central Bank of Costa Rica.[71]

The tribunal ordered that each party bear its own legal costs and expenses and share equally in the costs and charges of the tribunal and the ICSID.[72]

Marion Unglaube v Republic of Costa Rica (Award) (ICSID Arbitral Tribunal, Case No ARB/08/1, 16 May 2012); Reinhard Hans Unglaube v Republic of Costa Rica (Award) (ICSID Arbitral Tribunal, Case No. ARB/09/20, 16 May 2012)

Claimant: Mrs Marion Unglaube and Mr Reinhard Hans Unglaube (German nationals)

Date registered: 25 January 2008; 11 November 2009 (consolidated)

Investment agreement: Costa Rica - Germany Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Concluded (Final Award partially in favour of claimant)

The investments that were the subject of the proceedings were properties owned by the claimants and acquired for the development of an ecotourism project. The properties were located in the vicinity of Playa Grande, in the Guanacaste Province, Costa Rica. Playa Grande is a picturesque beach on Costa Rica's Pacific coast and an important site on which the endangered leatherback turtles lay their eggs. Costa Rica has undertaken numerous actions to protect the habitat; as early as 1991 it announced its intention to create the Las Baulas National Park and has pursued successive legal, administrative and court-ordered measures in pursuance of that objective.

The claimants alleged five separate categories of BIT violations: expropriation without compensation; failure to observe assumed obligations; unfair and inequitable treatment; failure to grant full protection and security; and impairment of the administration, management, use or enjoyment of investments by arbitrary or discriminatory measures.

The tribunal found in the claimants' favour in relation only to the expropriation claim made by Ms Marion Unglaube regarding a particular parcel of land (the 75-metre strip).[73] The tribunal found that Costa Rica, in the process of initiating expropriation of that land, did not make timely arrangements to determine the amount of compensation and make payment thereof to claimant Marion Unglaube.[74] The tribunal found that the rights of the claimant had been affected in a similar way as in ***Santa Elena*** and in obiter dicta said that the state responsibility for expropriation included proper drafting of expropriation laws.[75] Accordingly, the tribunal ordered that Costa Rica pay to claimant Marion Unglaube the sum of US$3.1 million plus interest to the date of the award for a total amount of US$4,065,900.33.[76]

The tribunal rejected the claimants' other arguments, including the allegation that Costa Rica failed to provide a stable and predictable legal and business environment and frustrated the investors' legitimate expectations.[77]

The tribunal ordered that each party bear its own legal costs and expenses and share equally in the costs and charges of the tribunal and ICSID.[78]

Quadrant Pacific Growth Fund LP and Canasco Holdings Inc v Republic of Costa Rica (Order of the Tribunal) (ICSID Arbitral Tribunal (Additional Facility), Case No ARB (AF)/08/1, 27 October 2010)

Claimant: Quadrant Pacific Growth Fund LP and Canasco Holdings, Inc (Canadian investors)

Date registered: 21 December 2007

Investment agreement: Canada - Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID Additional Facility

Status: Concluded (discontinuance noted; costs ordered against claimants)

The investments at issue in this case were orange plantations located on the northern border of Costa Rica (the Aprel lands), allegedly owned by the claimants. The claimants complained that Costa Rica had failed to take reasonable steps to address the continuing illegal trespass on the Aprel lands by illegal squatters. The claimants contended that Costa Rica's failure to enforce its law for the protection of private property resulted in damages to the Aprel lands, in violation of the BIT. The claimants pleaded that Costa Rica breached the provisions of the BIT concerning fair and equitable treatment, full protection and security, national treatment, and most-favoured nation treatment.

On the eve of the hearing on the merits and after almost two years of litigation and a staunch legal defence by Costa Rica, the claimants abandoned their claims. In January 2010, the tribunal decided to stay the proceedings pursuant to the ICSID Administrative and Financial Regulations and the ICSID Additional Facility Rules;[79] the Secretary-General of ICSID subsequently requested that the proceedings be discontinued. The tribunal took note of the discontinuance of proceedings and ordered that the claimants pay the sum of US$730,000 to Costa Rica in respect of fees and costs.[80] Although it is not common practice to include an order as to costs in an order providing for discontinuance, the tribunal took the view that the claimants' improper conduct justified such an order.[81]

Pending Cases

Supervision y Control SA v Republic of Costa Rica (ICSID Arbitral Tribunal, Case No. ARB/12/4)

Claimant: Supervision y Control SA (Spanish motor vehicle inspection company)

Date registered: 9 February 2012

Investment agreement: Spain - Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Pending

Cervin Investissements SA and Rhone Investissements SA v Republic of Costa Rica (ICSID Arbitral Tribunal, Case No. ARB/13/2)

Claimant: Cervin Investissements SA and Rhone Investissements SA (Swiss investors in a Costa Rican gas company)

Date registered: 11 March 2013

Investment agreement: Costa Rica - Switzerland Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Pending

Spence International Investments, LLC, Berkowitz et al v the Republic of Costa Rica (UNCITRAL Arbitral Tribunal, Case No. UNCT/13/2)

Claimant: Spence International Investments, LLC, Bob F Spence, Joseph M. Holsten, Brenda K. Copher, Ronald E Copher, Brette E Berkowitz, Trevor B Berkowitz, Aaron C Berkowitz and Glen Gremillion (US investors)

Date registered: 10 June 2013

Investment agreement: Dominican Republic Central America Free Trade Agreement (CAFTA-DR)

Arbitration forum: Ad hoc UNCITRAL arbitration

Status: Pending

David Aven et al v Republic of Costa Rica (UNCITRAL Arbitral Tribunal)

Claimant: Mr David Richard Aven, Mr Samuel Donald Aven, Ms Carolyn Jean Park, Mr Eric Allan Park, Mr Jeffrey Scott Shioleno, Mr Giacomo Anthony Buscemi, Mr David Alan Janney and Mr Roger Raguso (US investor)

Date registered: 24 January 2014

Investment agreement: Dominican Republic Central America Free Trade Agreement (the CAFTA-DR)

Arbitration forum: Ad hoc UNCITRAL arbitration

Status: Pending

Infinito Gold Ltd v Republic of Costa Rica (ICSID Arbitral Tribunal, Case No. ARB/14/5)

Claimant: Infinito Gold Ltd (Canadian mining company)

Date registered: 4 March 2014

Investment agreement: Canada - Costa Rica Bilateral Investment Treaty

Arbitration forum: ICSID

Status: Pending

Costa Rica's Compliance Record

Consistent with its obligations under international law, including under the ICSID Convention, Costa Rica has complied with the only two awards[82] that have ordered it to pay compensation to foreign investors,[83] both of which concerned uncompensated expropriation. Conversely, the foreign investors that brought unsuccessful claims against Costa Rica and ultimately were ordered by an international tribunal to pay the costs of proceedings to the state have failed to do so.

Endnotes

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Summary

LEGISLATION
PROCEEDINGS
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REMEDIES

Traditionally, when deciding on the recognition and enforcement of foreign decisions Dominican courts have relied on different legal systems that in most cases are not the applicable law. Before the enactment of the Law for Commercial Arbitration in 2008 and the Law for Private International Matters as recently as 2014, for the enforcement of foreign decisions in the Dominican Republic Judges would refer to the Private International Law Convention of 20 February 1928 (usually referred to as the Bustamante Code), the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the New York Convention) or the Civil Procedure Code to issue the corresponding administrative decision, since a formal procedure had not been established by law. Consequently, the case law for this process was diverse and unstable, enabling judges to deny or accept the recognition or enforcement of foreign decisions as per their own discretionary convictions, therefore affecting the judicial security and the growth of international transactions with Dominican counterparts.

However, with the enactment of the above-mentioned laws the procedure for the enforcement or recognition of foreign decisions has been formally introduced into the legal system as well as the obligations and limits of the courts regarding proceedings. Notwithstanding the existence of laws that govern the procedure for each type of decision, in practice, when encountered with a request for enforcement or recognition, Dominican courts do not differentiate between foreign arbitration awards and court judgments.

For example, in a recent controversial state-investor dispute the court's decision on the enforcement of the arbitration award issued under the ICC rules the court stated the Bustamante Code, as the applicable law and proceeded without considering the provisions of the Law for Commercial Arbitration, which was already in force and clearly states the procedure for the enforcement of arbitration awards.

The Law for Commercial Arbitration and the Law for Private International Matters set forth similar recognition and enforcement procedures; however, there are certain differences regarding exceptions for recognition of arbitration awards, as the judge may only raise ex officio certain exceptions for the recognition of an award, contrary to the provisions of the Law for Private International Matters where all exceptions must be raised by the judge. Under Dominican law, all decisions regarding the judicial appointment of arbitrators or the recognition of foreign awards will be rendered on an ex parte or administrative capacity through court orders, which enables expedited proceedings. This inability of Dominican judges to differentiate between foreign awards and judgments exposes these decisions to be challenged by the parties for overreaching in their duties under these procedures.

LEGISLATION

In the Dominican Republic, the rules and procedures for the recognition and enforcement of foreign decisions are contained in the Law for Private International Matters for foreign court judgments and in the Law for Commercial Arbitration for foreign arbitration awards.

The Law for Commercial Arbitration provides that foreign arbitration awards shall be enforced in the Dominican Republic in accordance with the provisions of the law and the applicable international treaties, as well as the competent jurisdiction and relevant proceedings, which will be discussed in detail below.

Furthermore, the Law for Commercial Arbitration establishes specific exceptions to the recognition or enforcement of a foreign award; the judge may raise some while others can only raised by the parties. A judge shall ex officio deny the recognition or enforcement of a foreign award when one of the following is identified:

• a violation of the right of defence of one of the parties due to non-compliance with due process;

• that the subject matter is not susceptible to arbitration under Dominican law; or

• that the recognition or enforcement of the arbitration award is contrary to public order.

Moreover, the party against whom the award is being enforced may, in addition to the exceptions established above, request the denegation of recognition or enforcement by raising and proving any of the following situations:

• that one of the parties to the arbitration clause was affected by an incapacity at the moment of executing the agreement, or that the arbitration clause was invalid under the law of the arbitration;

• that the arbitration award refers to a controversy not provided for in the arbitration clause, or contains decisions that exceed the terms of the arbitration clause;

• that the appointment of the arbitrators or the arbitration procedure was not executed in accordance with the arbitration clause or in the absence of agreement of the parties on these issues, that they were executed in disregard of the law of the country where the arbitration took place; or

• that the arbitration award is not yet binding on the parties or has been annulled or suspended by a competent authority of a country in which, or in accordance with the law of which the arbitration award has been issued.

However, in the case where the arbitration tribunal decided ultra petita, when possible, the dispositions of the arbitration award that cannot be enforceable may be separated, enabling the enforcement of the remaining parts of the award.

As for the recognition and enforcement of foreign court judgments, the Law for Private International Matters offers immediate recognition to judgments regarding legal capacity, existence of family relations and personality rights. Contentious judgments, however, shall be recognised and enforced after the exequatur procedure (administrative procedure referred to in detail in the following sections) has been completed.

The Law for Private International Matters establishes certain exceptions to the recognition of foreign court judgments that judges shall verify and apply. As for foreign arbitration awards, many of the exceptions are related to public order and due process.

Dominican courts shall not recognise or enforce decisions when:

• the recognition is manifestly against public order;

• when the judgment has been rendered without the presence of one of the parties and evidence that they were duly notified was not provided;

• if the decision is incompatible with a previous judgment rendered in another state among the same parties, regarding the same subject matter, and said judgment complies with the conditions to be enforceable in the Dominican Republic;

• if the subject matter of the judgment an excluded matter for the application of the Law for Private International Matters; and

• if the judgment does not meet the conditions for enforceability under the laws of the country where it was rendered and the conditions required under Dominican law for its validity.

PROCEEDINGS

As the proceeding to recognise and enforce foreign arbitration awards is regulated under the Law for Commercial Arbitration and the proceeding for foreign court judgments under the Law for Private International Matters, they enjoy distinctive procedural dynamics, although they do have vast similarities that may mystify local attorneys and judges, as discussed previously.

Both proceedings (for foreign arbitration awards and for foreign court judgments) are conducted ex parte, which implies that the plaintiff is not obliged to advise the defendant ('defendant' being any other party involved in the foreign litigation) of the claim and no hearings are to be scheduled by the local court. Consequently, the plaintiff empowers the competent local court by means of a simple motion executed by his attorney and addressed to the court with the appropriate exhibits. The exhibits must serve to prove the grounds that the judge should inspect on the merits.

The fact that neither proceeding shall be discussed through oral, contradictory debates constitutes one, if not the biggest, victory of domestic legislation concerning recognition and enforcement of foreign decisions. This ensures attaining two relevant, pragmatic goals: that the claim would not represent a 'trial de novo', in the sense that the local judge would perform a superficial review and may not examine the merits nor in any way modify the foreign decision, and it should definitively speed up proceedings as a court order shall be rendered within a more reasonable time frame than an ordinary contentious claim.

The grounds for both cases are alike, as the two applicable laws (the Law for Commercial Arbitration and the Law for Private International Matters) provide that the Dominican court should limit its intervention to review basic due process principles, but most importantly the traditional cause of public order consistency between the foreign decision and the local legal system. In the particular case of arbitration awards, local courts must also review arbitrability and the parties' legal capacity to arbitrate the dispute that led to the arbitration award.

JURISDICTION

One of the aspects that may produce confusion in the day-to-day practice is the one related to the competent jurisdiction in the Dominican Republic to review the claim to recognise and enforce the foreign decision, which is usually named an 'exequatur claim'.

For many years, prior to the enactment of the Law for Private International Matters, there was uncertainty regarding court judgments on the issue of identifying the proper forum in the country to discuss a claim of this nature as the then-existing law failed to specify any provision in this topic. Henceforth, the plaintiff was forced to apply general law principles such as actor sequitur forum rei, which provides that the competent jurisdiction for a claim that is not exclusively related to an asset ('personal actions', as defined by the law) is the local court placed within the defendant's domicile in the Dominican Republic. After the enactment of the Law for Private International Matters, the exclusive competent jurisdiction for an exequatur claim is the Civil and Commercial Chamber of the Court of First Instance of the National District, notwithstanding the defendant's domicile in the country.

A similar scenario occurs in foreign arbitration awards, as the Law for Commercial Arbitration sets forth that the same court, that is, the Civil and Commercial Chamber of the Court of First Instance of the National District, is entitled to hear an exequatur claim. This means that there is a huge similarity between the methods of enforcing a foreign arbitration award and a foreign court judgment: the local court is exactly the same. However, the selection of the same court for both proceedings has created the possibility for court to apply any of the established procedures indistinctively, not differentiating between foreign arbitration awards and court judgments.

The purpose of the law when setting a specific local court in both matters seems logical, as it specialises the acting judges in these sort of matters and eliminates any discussion on the competent jurisdiction based on the parties' domiciles, particularly when it is likely that neither party is domiciled in the Dominican Republic given the foreign nature of the proceedings.

REMEDIES

In this final section we will refer to the available means under Dominican law to challenge a local decision that allows enforcement of a foreign decision, whether an arbitration award or a court judgment.

For arbitration awards, the law provides that the interested party may question the decision from a Dominican court that accepts the exequatur claim through a direct claim before the correspondent Court of Appeals. The purpose of such claim is to reverse the decision of the local court and it should be founded on identical causes so that the judge might grant exequatur at the first phase (due process, public order, arbitrability, etc). The filing of this claim does not stay the enforcement of the foreign arbitration award. To prevent the enforcement of the foreign award the interested party may complement the direct claim with an ancillary claim or injunction before the Chief Justice of the Court of Appeals to provide temporary stay of the challenged decision.

It is important to point out that this direct claim is not a remedy of appeals, even though it should be filed, the same as ordinary appeals, within a 30-day deadline before an appellate court. The differences are notorious: ordinary appeals stay the challenged decisions and the court hears the appeal on a 'trial de novo' basis, while the direct claim at issue fails to stay the decision and is limited to the specific causes set forth by the law.

As for court judgments, the local decision on the exequatur claim may be subject to an ordinary remedy of appeals before the competent Court of Appeals. Contrary to the regimen of foreign arbitration awards, once an appeal is submitted the challenged decision is stayed until a definitive decision from the Court of Appeals is issued. In any case, if the original judge rejects the exequatur claim the plaintiff may reinsert the claim, as ex parte decisions lack res judicata.

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Ecuador

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Summary

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ARBITRATION AND MEDIATION LAW: GUIDELINES FOR APPLICABILITY

Arbitration in Ecuador is regulated by the Arbitration and Mediation Law of 1997 (AML).[1] The AML provides for a dualist regime comprising detailed rules governing local arbitration and a few – albeit determinant – rules on international arbitration. Additionally, pursuant to the AML, other bodies of law, such as the Organic Code of Procedures (COGEP), the Organic Code for the Judiciary (OCJ) and the Civil Code,[2] may be supplementary to it, provided that arbitration is conducted at law.[3]

As regards international arbitration, article 42 of the AML categorically provides the following:

International arbitration shall be regulated by treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Every natural or juridical person, public or private with no restrictions whatsoever is at liberty, directly or by reference to an arbitration regulation, to stipulate everything concerning the arbitration proceeding, including its establishment, discussions, language, applicable legislation, jurisdiction and seat of the arbitration panel which may be in Ecuador or in a foreign country.

The above norm sets forth the principle of pre-eminence of free will in matters of international arbitration on the basis of which everything relating to the arbitration proceeding can be freely agreed by the parties, resulting in important consequences including the following:

• Parties may elect any norms to conduct an ad hoc or institutional arbitration proceeding. This attribution would mean that, in principle, the procedural norms for international arbitration chosen by the parties would not clash with local law unless they infringe norms pertaining to public policy – not clearly defined in Ecuador. Despite this lack of definition, we consider that norms such as those relating to the due process (specified below) would be included in this category.

• AML provisions for local proceedings are not necessarily applicable to international arbitration, except restrictedly to the assumptions described in this chapter.

• Ecuador does not have a law on international arbitration that might limit the prerogatives of article 42 of the AML with respect to an arbitration proceeding.

• Substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

It is therefore necessary to outline such assumptions where Ecuadorean law could be applicable to international arbitration. In principle, local law is important when it operates as lex arbitri, namely, when it is the law of the place where the arbitration is conducted. Lex arbitri is fundamental for certain questions that could arise before, during and after arbitration, especially provisions that might be deemed imperative or pertaining to public policy. Although not intending to provide a fully comprehensive list of such questions, it is clear that the rules comprised in Ecuadorean law might include at least the following aspects:

• creation and effects of the arbitration agreement;

• subjective and objective arbitration;

• recusation and excuse of the arbitrators;

• *Kompetenz-Kompetenz* principle;

• due process rules;

• preventive measures;

• judicial assistance;

• formalities for issuing the arbitral award;

• actions and recourses against the award; and

• jurisdiction of the courts.

INTERNATIONAL COMMERCIAL ARBITRATION: DEFINITION AND SCOPE

The AML does not have an explicit definition for international arbitration. It only mentions the requirements for a proceeding to be considered as such. Article 41 sets forth two kinds of requirements: one is subjective and another is objective. In the former case, the parties must establish in their agreement that the arbitration will be international. In our opinion, this agreement does not have to be explicit – the mere adoption of foreign laws, regulations or other set of rules regarding international arbitration ought to be interpreted as the parties' positive decision that the arbitration is international. In the latter case, it is necessary that the dispute be included within at least one of the following assumptions:

• if at the time of execution of the arbitration agreement the parties are domiciled in different states;

• if the place where a substantial portion of the obligations is to be performed or to which the issue under litigation is most closely related is situated outside the state in which at least one of the parties is domiciled; or

• if the issue being litigated relates to an international trade operation[4] susceptible to compromise and not affecting or impairing national or collective interests.

Characterising an arbitration proceeding as international is vitally important because by virtue thereof the parties may accede to the preeminence of the free-will principle set forth in the AML and mentioned in the preceding section, as well as to international instruments regarding this issue executed and ratified by Ecuador.

INTERNATIONAL CONVENTIONS

According to Ecuador's legal system, international law is subordinated to the Constitution and prevails over and above any other domestic laws,[5] except with respect to human rights where international instruments may prevail over the Constitution if they stipulate more favourable rights to persons.[6]

With regard to international arbitration, Ecuador adopted the main international instruments on this subject quite early, including:

• the 1928 Havana Convention on Private International Law;[7]

• the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);[8]

• the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention)[9] (recently denounced);[10]

• the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);[11] and

• the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[12]

INTERNATIONAL ARBITRATION AND FOREIGN INVESTMENT PROTECTION

There is a strong political will to withdraw from several bilateral investment treaties (BITs) through which Ecuador gives its consent to international arbitration.[13]

Actually, the Constitutional Court has issued a series of decisions declaring that the dispute settlement provision of BITs[14] is unconstitutional. This is done as part of a major scheme to withdraw from those treaties because they are considered to be the illegitimate cession or waiver of sovereign powers; namely, the power of Ecuadorean courts to exercise their jurisdiction within the territory of Ecuador. Currently, the only BIT that is being denounced is the BIT with Finland; the other treaties have not been denounced by the government. The government is waiting for the Commission for the Citizens' Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments' (CAITISA) report.

CAITISA

After unfavourable judgments from a number of international tribunals, the government moved to limit its international liability by denouncing a number of treaties. The attack began with a letter dated 5 October 2012 issued by the National Juridical Secretary on behalf of President Correa, addressed to ministers and public authorities, informing them that 'in future, contracts to be concluded by Ecuador, disputes must be submitted only to local courts and not to arbitral tribunals'.[15]

The letter does not distinguish between local or international arbitration, so we can infer it applies to any kind of arbitration clause that may be included in an administrative contract. Despite this, Ecuador's initiative to submit disputes with foreign investors arising from specific contracts to international arbitration under UNCITRAL rules, having Santiago de Chile as the seat of arbitration, remains unaltered. The Attorney General has already approved this type of arbitral provision as required by the Constitution in several contracts.

Executive Decree 1506, dated 6 May 2013,[16] established the creation of CAITISA. The objectives of CAITISA are to examine and evaluate:

• the execution and negotiation process of BITs and other agreements on investment signed by Ecuador, as well as the consequences of their application;

• the content and compatibility of those treaties with Ecuadorean legislation; and

• the validity and appropriateness of the actions, proceedings and awards issued by international investment tribunals and arbitral bodies where Ecuador has been a party.

CAITISA's objective is to determine, from a legal, social, economic and political perspective, the legality, legitimacy and fairness of the decisions, and to identify inconsistencies and irregularities that have caused or may cause impacts on the Ecuadorean state in economic, social and environmental matters.

To complete its tasks, CAITISA will have an eight-month period (extendable for additional eight months) and broad access to 'the entire content of instruments for treatment of foreign investment and dispute resolution on the matter'. All public institutions are obliged to provide CAITISA with the information it requests. Up to this date, CAITISA has not issued a formal declaration on any matter.

This period has been extended and CAITISA is scheduled to render its final report at the end of 2015. The issuance of this report will be of true relevance for the development of international arbitration in Ecuador and for the future of bilateral investment treaties that will certainly be mentioned in CAITISA's report.

Finally, CAITISA drafted a bill that still has to be introduced before Congress which grants immunity from civil and criminal liability to all of its members for any results the report may contain. This type of immunity is common for truth and reconciliation commissions but not for this type of administrative commission.

It is important to note that one of the tasks of CAITISA is to determine the 'legality, legitimacy and fairness' of decisions issued by arbitral tribunals against the Ecuadorean state. This power will affect the enforcement of foreign awards. Any local judge who is aware of a negative ruling by CAITISA will at least think twice before enforcing an award that orders the state to compensate investors for violations of their rights.

PENDING CASES AGAINST ECUADOR

To date, Ecuador has more than a dozen pending international arbitration cases pertaining to investment and five notifications of existence of a dispute filed under different bilateral investment treaties.

ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN ECUADOR

Under the recently enacted Organic Code of Procedures there is doubt about the new mechanism for the enforcement of international arbitral awards. Article 103 states that international awards will be enforced according to international conventions ratified by Ecuador. This seems to be a direct reference to the New York Convention; unfortunately, article 104 says that to enforce an international award, a judge must verify that the following conditions have been met:

• that all the formalities required by the state where the award was rendered were observed;

• that the award is firm;

• that the award is translated; and

• that due process was observed.

For non-commercial disputes the COGEP sets the bar even higher and requires demonstration that the awards are in accordance with national law. This provision was surely introduced in light of the possible unfavourable international investment awards against Ecuador.

OTHER ASPECTS WORTH MENTIONING

Recently the development of arbitral proceedings is being disturbed by a series of constitutional actions impeding the regular development of arbitral cases. Judges are currently invoking constitutional rights to force arbitrators to refrain from entertaining certain arbitral proceedings or force them to make important jurisdictional decisions on the nascent stages of the proceedings.

Additionally, we have learned about an attempt from the disciplinary board of the judiciary to initiate administrative proceedings against an arbitral tribunal. The judiciary has no right to rule or entertain disciplinary actions against arbitrators.

2015 has also been important for arbitration owing to the recent decisions in the ***Perenco*** and ***Murphy*** cases and the possible issuance of the CAITISA report.

Endnotes

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Summary

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PRELIMINARY CONSIDERATIONS

Pursuant to the legal provisions on commercial arbitration regulated in the Commerce Code[1] and the Arbitration Rules of the ICC,[2] arbitral awards are binding to the parties and must be complied without delay. If they are not voluntarily complied, they must be enforced. Once an award is issued, it is considered to be definitive and binding under the applicable law or the arbitration rules, and must be enforced by the competent court of the place where the enforcement is requested. According to article 1461 of the Commerce Code and the international treaties signed by Mexico, such as the New York Convention{{+footnotes}} and the Panama Convention,[3] a party requesting enforcement has the fundamental right of access to justice and, with it, the right to request of national or foreign tribunals the recognition and enforcement of an arbitral award, complying with the requirements provided for in international treaties and not any other additional requirements.[4]

There is no court in any country with the extraterritorial authority or jurisdiction to order another court in a different country to suspend a proceeding initiated for the enforcement of an award. It is the court of enforcement that holds the discretion to adjourn the decision on the enforcement of the award if there is an application for the setting aside or suspension made to a competent authority at the place of arbitration. Upon application of the party claiming enforcement, such court may order the other party to give suitable security.

This mechanism is recognised by the New York Convention and the Mexican Commerce Code, and effectively allows a party requesting the annulment of an arbitral award to oppose the enforcement of such award while the determination on annulment is pending, giving suitable security in the enforcement proceeding. It goes against the established provisions of international arbitration and is nonsensical for a party requesting annulment to also require the court at the seat of arbitration to grant an anti-enforcement injunction ordering a party from refraining to enforce a binding arbitral award before national or foreign courts.

FACTS

Party A commenced arbitration against Parties B and C – state entities – for breach of contract. The Tribunal issued an award on liability and thereafter an award on quantification of damages (the final award) condemning B and C. These parties filed for the annulment of the final award before local courts (nullity claim) and requested the issuance of a provisional measure, ordering Party A to abstain from commencing a procedure for the recognition and enforcement of the final award before local and foreign courts.

On 11 December 2012, the District Court ordered the admission of the nullity claim and issued a provisional measure directed at Party A (the anti-enforcement injunction) based on article 1478 of the Mexican Commerce Code. The District Court ordered Party A to 'abstain from initiating or continuing any action aimed at obtaining the recognition and enforcement of the award on quantification' in Mexico or elsewhere with the purpose to 'preserve the existing situation and the subject' of the annulment proceeding. Also, the District Court ruled that there was no need for Parties B and C 'to provide security for the damages or losses which could be caused by the granting of the provisional measure' given that these parties are entities of the public administration and therefore exempt from providing such guarantee.

Party A initiated a constitutional proceeding against the decision issued by the District Court. The constitutional tribunal ruled in favour of the protection of Party A against the anti-enforcement injunction (the ***amparo*** decision). The ***amparo*** decision provided that the

issuance of the provisional measure violated the right of 'access to justice' by preventing Party A from initiating or continuing a procedure for the recognition and enforcement of the arbitral award. The tribunal declared that the anti-enforcement injunction was illegal because it did not observe the general principles for the issuance of provisional measures and because it contravenes human rights and the principles of legality and legal certainty provided for in articles 14, 16 and 17 of the Mexican Constitution. Also, the ***amparo*** decision considered that the filing of the claim for recognition and enforcement does not impact the subject matter of the annulment proceeding given that both actions have autonomy and could be ruled separately.

Notwithstanding the reasoning above, the constitutional tribunal ordered the District Court to annul the ***amparo*** decision and to 'issue another with the purpose of preserving the subject matter of the annulment proceeding but which does not restrict [Party A's] fundamental right of access to justice'. Given that the provisional measure was unconstitutional in the terms requested by B and C, the ***amparo*** should have been complete, not leaving any room for a possible new measure. There is no legal justification to order the District Court to grant another measure to preserve the subject matter of the annulment proceeding when it has already been settled that the terms in which it has been requested are incompatible with Party A's fundamental rights of access to justice.

In consideration of the previous, Party A partially challenged the ***amparo*** decision. The following issues were settled before the review tribunal, through a decision issued on 28 November 2013.

LEGAL ISSUES THAT ARISE FROM THIS CASE

A Provisional Measure, Granted During An Annulment Proceeding, Is Illegal And Not Contemplated By The Provisions Of The Commerce Code

There are no legal provisions in the Commerce Code that allow a court to grant a provisional measure during the annulment proceeding of an arbitral award. This position may not be interpreted or inferred from the content of the provisions of the Commerce Code either.

In the discussed case, the provisional measure was granted according to article 1478 of the Commerce Code, which provides: 'The judge shall have full discretion in the adoption of the provisional measures referred to in article 1425.' Thus, article 1425 provides that: 'Even where there is an agreement to arbitrate, parties may prior to the arbitral proceedings or during its conduction, request a judge the adoption of provisional measures.' From the wording of these provisions, it is evident that provisional measures may be granted in support of arbitration before the initiation of the arbitral proceeding to maintain the status quo of the arbitration and ensure that the arbitration is possible, and to preserve the subject matter of the dispute; or during the conduction of the arbitration in support to the arbitral tribunal. These articles do not contemplate the possibility to grant provisional measures once the arbitral proceeding has concluded. According to article 1449 of the Commerce Code, arbitral proceedings conclude with the issuance of the final award.

In the discussed case, the arbitration had already been conducted and the final award issued. Therefore, the District Court had no power to grant a provisional measure during the annulment proceeding in order to bar Party A from exercising its legal right to request the enforcement of the final award.

The District Court created a new legal situation that is not contained in the Mexican legal regime. Therefore, the review tribunal confirmed that there is no legal support to grant another provisional measure in order to 'preserve the subject matter of the annulment proceeding', as this situation is not regulated in the Commerce Code.

The Position That National Courts In An Annulment Proceeding Have Priority Is Contrary To Mexican Law On Commercial Arbitration

Parties B and C filed for the review of the amparo decision, with the contention that national tribunals must be allowed to analyse the validity of the arbitral award prior to its execution. They reason that the existence of a procedure for recognition and enforcement of an arbitral award will necessarily lead to its enforcement, and that the procedure of recognition and enforcement deprives local tribunals of the jurisdiction to solve with regards to the annulment of the arbitral award. These parties argued that it is not possible to accumulate foreign proceedings and that without the provisional measure the Mexican judiciary will be prevented from analysing the validity of the final award prior to the foreign judges. Also, they have argued that national judges would not have the priority to solve the annulment of the award if leave for enforcement is allowed.

This position is contrary to the Mexican law on commercial arbitration. The review tribunal recognised in its decision the following:

• Article 1461 of the Commerce Code, and articles 4, 5 and 6 of the New York Convention, allow a party to request the recognition and enforcement of the arbitral award in other jurisdictions. According to the New York Convention, the court requesting the enforcement of an award that has been annulled in another jurisdiction has the power of recognising that annulment.

• Foreign courts shall not analyse the validity of the arbitral award. This analysis may only be conducted by competent courts at the place of arbitration. Therefore, according to the provisions of the Commerce Code, New York or Panama Conventions, foreign judges may only recognise and execute the award, or refrain from doing so, if a cause for doing so is found.

• Accepting that the national courts must analyse the validity of the awards issued in their territory before they may be enforced in such country or abroad is contrary to human rights, the Commerce Code, and the New York and Panama Conventions, which oblige courts of a state to recognise and enforce arbitral awards issued by another state party.

• Allowing the District Court to prevent Party A from enforcing the award, which is binding and has the nature of a final judicial decision, is contrary to the Commerce Code and articles III and V of the New York Convention and 4 and 5 of the Panama Convention.

• Parties B and C were never defenceless, given that they could have argued article VI of the New York Convention and article 6 of the Panama Convention before a foreign judge, requesting a stay in the enforcement proceeding until the annulment decision was issued.

Security To Stay Enforcement Pending Annulment Of An Award

Article VI of the New York Convention and article 1463 of the Commerce Code provide that the court of enforcement of the arbitral award may ask that the party requesting the stay of this procedure provides security, pending a determination on the annulment proceeding.

Notwithstanding the above, in the case being discussed, the District Court ordered the anti-enforcement injunction and determined that it was not necessary for Parties B and C to provide security. In this situation, the government entity received a more favourable treatment than the one provided for in the applicable regulations.

Thus, the anti-enforcement injunction created an unequal ground whereby a party requesting the annulment of an arbitral award has all the rights and none of the burdens in prejudice to the party that has obtained a binding arbitral award, and is prevented from enforcing this decision with no security either.

COMMENTS

The reasoning by the constitutional tribunal for annulling the anti-enforcement injunction was a first (but partial) step for the positive reinforcement that the Mexican state favours the recognition and enforcement of arbitral awards, both in its territory and abroad. The legal reasoning, followed by the constitutional tribunal, correctly interpreted the autonomous nature of both the annulment procedure and the recognition and enforcement procedure by concluding that depriving a party of its right to legal action is contrary to human rights and to the general principle of the law of 'access to justice'.

Notwithstanding the above, the constitutional tribunal did not fully analyse the legal matters that arise from this case and incongruently ordered the District Court to issue another decision to protect the subject matter of the annulment proceeding.

Nevertheless, the decision of the review tribunal corrected the partial analysis conducted by the constitutional tribunal in a consistent manner with the objectives of the provisions of arbitration of the Commerce Code (which incorporate the UNCITRAL Model Law provisions), the New York and Panama Conventions. The review tribunal gave through its decision full effects to these legal instruments and acknowledged that a court maintains the discretion to enforce an arbitral award even when annulment proceedings are occurring in the country where the award was rendered.[5]

The solution adopted by the review tribunal is clear evidence that Mexican courts are motivated by an interest in facilitating the recognition and enforcement of foreign arbitral awards, not preventing it. The stance that was ultimately followed by the review tribunal has clearly strengthened the efficacy of international awards in a view to the objectives of the New York Convention and the needs of foreseeability and fairness in the scope of judicial review.

Endnotes

Peru

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Summary

PROVISIONS APPLICABLE BEFORE AN AWARD IS ISSUED
PROVISIONS APPLICABLE AFTER THE AWARD IS ISSUED
CONCLUSION
ENDNOTES

The 2015 Peru chapter provided a detailed review of the 2008 Peruvian Arbitration Law (approved through Legislative Decree No. 1071 and hereinafter referred to as the Arbitration Law) which focused on the (limited) grounds for setting aside arbitral awards, as well as on the most recent developments in Peruvian arbitral practice. This year's chapter will closely examine the Arbitration Law focusing on the provisions that may be applicable to arbitration procedures seated outside Peru.

Article 1.2 of the Arbitration Law refers to the rules that may be applicable to arbitration procedures taking place outside Peru. Some of these rules are useful before or during the arbitral proceedings, that is, prior to the award (sections 1, 2, 3, 5 and 6 of article 8 together with articles 13, 14, 16, 45 and section 4 of article 48); while other rules will be useful once the award has been issued (articles 74, 75, 76, 77 and 78). Hence, this year's chapter analyses the rules that could be applicable 'before' the tribunal issues a final award, as well as the rules that could be applicable 'after' an award is rendered, in the context of arbitration seated outside Peru.

Regarding the rules that may be applicable 'before' a final award is issued, the Arbitration Law includes provisions giving foreign tribunals or parties' access to the Peruvian judiciary to uphold the agreement to arbitrate, provide assistance in the taking of evidence, or enforce provisional remedies, among others. As to the rules that may be applicable 'after' the tribunal renders an award, the Arbitration Law includes provisions concerning recognition and enforcement of foreign arbitral awards by local courts. On this matter, it is important to mention that Peru is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and to the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention).

PROVISIONS APPLICABLE BEFORE AN AWARD IS ISSUED

Motion to dismiss on the grounds of an agreement to arbitrate – upholding the agreement to arbitrate abroad Pursuant to article 16 of the Arbitration Law, if a judicial claim has been filed and the claim relates to matters falling within the scope of an agreement to arbitrate, the court shall dismiss the claim and refer the parties to arbitration. This is the general rule for arbitral procedures seated in Peru. Pursuant to article 16.4, a similar rule is available if the arbitration is (or will be) seated abroad.

If the arbitral procedure has not yet begun and a judicial claim – over the same subject matter – is brought before Peruvian courts, the party seeking to uphold the agreement to arbitrate will have to file a motion to dismiss and provide evidence of the existence of the agreement to arbitrate. On the other hand, the party wishing to settle the dispute before the court (thus avoiding the arbitration procedure) will have to prove that the agreement to arbitrate is manifestly invalid.

Judges, therefore, lack the authority to determine if the subject matter falls within the scope of the agreement to arbitrate (which is consistent with the ***Kompetenz-kompetenz*** principle recognised in article 41 of the Arbitration Law). The court has limited discretion and shall endorse the agreement to arbitrate and refer parties to arbitration, unless the court finds that the agreement is manifestly invalid. To make such determination, the court will have to analyse the agreement to arbitrate under the rules applicable to the agreement or the rules applicable to the merits. Nonetheless, if the arbitration agreement meets the formal requirements set in the Arbitration Law (pursuant to article 13), Peruvian courts will then

have the duty to grant the motion to dismiss, thus upholding the agreement to arbitrate abroad. This means that the formalities that must be met by the agreement pursuant to the Arbitration Law will also be relevant in the context of arbitration procedures seated outside Peru.

In the event that the arbitration procedure has already begun, and parties find themselves facing parallel procedures in which the arbitral procedure seats abroad, while the judicial procedure seats in Peru, Peruvian courts will dismiss the judicial claim. The only exception to this rule is that the party acting as claimant before the courts is able to prove that the subject matter manifestly violates international public policy.[2]

Article 16.4 of the Arbitration Law is consistent with article II.3 of the New York Convention as well as with article 8 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, but also sets a higher threshold in favour of the enforcement of the agreement to arbitrate. Neither the Convention nor the Model Law include an explicit provision stating that only in manifest cases of invalidity, the agreement to arbitrate will not be enforced. To prevent local courts from making a full review of the agreement to arbitrate the Arbitration Law makes explicit reference to the manifest nature of the invalidity, thus excluding the agreement's 'inoperativeness' and 'inability of being performed' as grounds for refusing to enforce the arbitration agreement.[3]

Definition And Form Of The Agreement To Arbitrate

The form of the arbitral agreement set in the Arbitration Law is relevant in arbitration procedures seated outside Peru. As mentioned before, article 16.4 of the Arbitration Law establishes that if the agreement to arbitrate abroad meets the requirements set by: the law applicable to the arbitral agreement; or, the law applicable to the merits; or eventually, the Arbitration Law; Peruvian courts shall dismiss the claims brought before them.

Article 13.7 of the Arbitration Law – also applicable to arbitration procedures seated outside Peru – has a similar content. Indeed, pursuant to article 13.7, the agreement to arbitrate will be valid if it meets the requirements set by the law applicable to the agreement, by the law applicable to the merits; or by Peruvian (Arbitration) Law. The definition and form of the agreement to arbitrate set by the Arbitration Law is, therefore, relevant even when arbitration procedures take place outside Peru.

Article 13 of the Arbitration Law refers to the definition and form of the arbitration agreement. Said provision closely follows the definition made in article 7 (option I) of the UNCITRAL Model Law. Article 13.1 defines the arbitral agreement as the agreement in which the parties submit to arbitration all or certain disputes that have arisen or may arise between them with respect to a defined legal relationship, whether contractual or not.

As to the formalities of the arbitration agreement (which, as stated before, will be relevant in the event that an arbitration is seated abroad), article 13.2 states that the agreement shall be in writing and may be in the form of a clause included in a contract or in the form of a separate agreement. Article 13.3 states that an agreement will be deemed to be in 'in writing' if it is recorded in any way, even if the agreement or contract is concluded by performing conduct or by any other means. Moreover, article 13.4 states that the written nature of the agreement is met if an electronic communication is sent and the information contained therein is accessible for subsequent reference. An 'electronic communication' will be such communication made through data messages, and 'data message' refers to information sent, received or stored by electronic, magnetic, optical or similar means, including but not

limited to electronic data interchange, electronic mail, telegram, telex or telecopy. Continuing with the formal aspect of the agreement to arbitrate, article 13.5 states that an arbitration agreement will be 'in writing' if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party, and not denied by the other. Finally, pursuant to article 13.6 the agreement will also be considered 'in writing' when a contract refers to any document containing an arbitration agreement, if the reference implies that clause is part of the contract.

Moreover, Peru has a regulation on the extension of the arbitration agreement to non-signatory parties. The implied consent to an arbitration agreement is regulated in the Arbitration Law. According to article 14, the arbitration agreement comprises all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination of the contract that contains the arbitration agreement, or to which the agreement is related. It also comprises all those who seek to obtain any rights or benefits from the contract, pursuant to its terms. This is important to determine who can be part of the arbitration agreement in accordance with the Arbitration Law. In other countries this point has been recognised by case law.

If an arbitral procedure is seated outside Peru, Peruvian courts should uphold the agreement to arbitrate if the formal requirements set in the Arbitration Law (described in the previous paragraph) are met. With this provision, if a party files a judicial claim before Peruvian courts, the party wishing to maintain the agreement to arbitrate abroad is allowed to argue the validity of the agreement under Peruvian Law (which is almost identical to Option I of article 7 of the UNCITRAL Model Law). This rule seeks to promote efficiency insofar as it would give the option to Peruvian courts to consider the validity of the agreement
under Peruvian law, and not under a foreign law that would be subject to proof and would lead to delays in the decision and further costs. This is because under Peruvian Law parties have
the burden of proving the existence and interpretation of foreign law.
Court assistance in taking of evidence – 'Direct' and 'indirect' assistance

In the context of arbitrations seated in Peru, the arbitral tribunal or a party (with the approval of the arbitral tribunal) may request assistance in taking evidence from a competent court. This rule is contained in article 45 of the Arbitration Law, which closely follows article 27 of the UNCITRAL Model Law. Article 45 of the Arbitration Law also extends to arbitration procedures seated abroad. If certain pieces of evidence are located in Peru, and the arbitration takes place abroad, the arbitral tribunal as well as the parties (authorised by the tribunal) can request the assistance of Peruvian courts to secure the taking of evidence.

Pursuant to article 45.2, judicial assistance by Peruvian courts in the taking of evidence can be performed directly or indirectly. Direct assistance in the taking of evidence means that the competent court, upon request of the foreign tribunal or party, may have broad discretion to take the evidence in the manner it deems more effective. Indirect assistance in the taking of evidence means that the competent court, upon request of the foreign tribunal or party, may adopt specific measures with the purpose of allowing the arbitral tribunal to take the evidence directly. In other words, under the second option, Peruvian courts would place the evidence at the tribunal's disposal.

Article 45.3 states that Peruvian courts lack the authority to establish the admissibility on the merits of the taking of evidence. The only grounds which may allow the courts to deny

assistance are the request is contrary to public policy or the request is contrary to express prohibitive laws.

Enforcement Of Provisional/interim Remedies Issued By An Arbitral Tribunal Seated Abroad

Availability Of Provisional/interim Relief Before And After The Arbitral Tribunal Is Constituted

This section will cover two scenarios: a first scenario in which arbitral tribunals grant interim relief (after the constitution of the tribunal seating abroad, during the arbitral proceedings) and, a second scenario in which Peruvian courts grant interim relief (before the constitution of the tribunal to be seated abroad, and the procedure is yet to be initiated).

Availability Of Interim Relief Granted By Foreign Arbitral Tribunals

Article 48.4 of the Arbitration Law expressly states that measures granted by arbitral tribunals seated abroad shall be recognised and enforced by Peruvian courts. The measure will be enforced upon application and Peruvian courts lack discretion to review the merits of the decision.[4] Peruvian courts, however, have the discretion to require the party that seeks the enforcement of the measure, to provide appropriate security if the arbitral tribunal has not ruled on this issue or when such security is necessary to protect the rights of third parties potentially affected by the interim measure.[5]

As to the formalities, the party who is seeking recognition and enforcement of the interim measure rendered by a foreign arbitral tribunal has the duty to submit an original or a duly authenticated copy of the decision (under the laws of the country in which the decision is issued).[6] According to article 9.3 if the decision is drafted in a language other than Spanish, the party will have to submit a translated version of the decision.[7] The judicial authority may request an official translation of the document only if necessary.

The grounds for recognition and enforcement of a foreign decision on interim measures by Peruvian courts are the same as those applicable for the recognition and enforcement of foreign arbitral awards.

Availability Of Interim Relief Granted By Local Courts

Pursuant to article 47.4 of the Arbitration Law (applicable to arbitration procedures seated in Peru), it is possible to obtain interim relief from the courts prior to the constitution of the arbitral tribunal. Indeed, article 47.4 of the Arbitration Law – consistent with articles 9 and 17 J of the UNCITRAL Model Law – states that it is compatible with an arbitration agreement: for a party to request the courts for an interim measure before the beginning of an arbitration procedure; and for the courts to grant such measure.

The rule contained in article 47.4 is not included, however, amongst the list of articles that, according to article 1.2 of the Arbitration Law, are applicable to arbitration proceedings seated abroad. This may lead to the interpretation that in the context of arbitration procedures to be seated abroad, it would not be possible to request Peruvian courts for an interim measure before the arbitral tribunal is constituted, and the procedure is yet to be commenced. In other words, interim relief would only be available during the course of the proceedings taking place abroad, if the arbitral tribunal grants it. Said interpretation, however, has not been generally adopted by Peruvian courts.

Some trial courts have interpreted that it is indeed possible to obtain interim measures (for example, attachments over assets located in Peru) before the beginning of an arbitration procedure that will seat abroad. This means that Peruvian courts make no distinction

between the interim relief that may be available to parties in an arbitration seated in Peru and an arbitration procedure seated abroad. If the court grants interim relief and the tribunal is later constituted (parties have the burden of making this information available), the court will forward the relevant documents to the arbitral tribunal, and the tribunal will then decide to ratify or reverse the decision.

Through this interpretation, Peruvian courts attempt to promote efficiency by allowing the requesting party to obtain temporary protection – during the period in which arbitrators are being appointed – from situations that may likely cause current
or imminent harm affecting the requesting party, the arbitral process itself, or both. This interpretation allows the preservation of assets that may be required to satisfy the award or securing evidence that may assist the tribunal to better adjudicate the dispute.

Other Relevant Provisions

Article 8 of the Arbitration Law refers to the competent judicial authorities in charge of: upholding the agreement to arbitrate abroad; providing judicial assistance in the taking of evidence located in Peru; or recognising interim measures issued by a foreign arbitral tribunal. In these cases, the civil judge specialised on commercial matters will have jurisdiction. In the absence of a civil judge specialised on commercial matters, the civil judge of the place in which the provisional remedy will be executed or the civil judge of the place in which the provisional remedy will display its effects; will have jurisdiction.

PROVISIONS APPLICABLE AFTER THE AWARD IS ISSUED

Applicable Rules To Recognition And Enforcement Of Foreign Arbitral Awards – Treaties Are The Default Rule

Article 74.1 of the Arbitration Law states that awards issued outside of Peruvian territory are considered foreign arbitral awards for the purposes of the law. It also states that foreign arbitral awards will be recognised and enforced according to the rules set: in the New York Convention, in the Panama Convention and under any other treaty dealing with the recognition and enforcement of arbitral awards.

Article 74.2 states that unless the parties have agreed otherwise, the applicable treaty will be the one most favourable to the party requesting the recognition and enforcement of the foreign arbitral award. Treaties are, therefore, the default source of law when it comes to recognising or enforcing foreign arbitral awards. Article 75 of the Arbitration Law will be applicable in the absence of a treaty or, if the provisions set in article 75 are more favourable to the recognition and enforcement of the foreign award, when compared to an applicable treaty.

It is important to consider that the Arbitration Law has recognised the most-favourable-right provision of article VII of the New York Convention, in article 78.1. According to this provision, the court is allowed to apply, the Arbitration Law in cases of recognition of arbitral awards if it is more friendly for the purposes of recognition.

Recognition Of Foreign Arbitral Awards Under The Arbitration Law

Article 75 of the Arbitration Law does not allow Peruvian courts to review the merits of the award, and closely follows the grounds for refusal set in article V of the New York Convention.

Generally, foreign arbitral awards should be recognised in Peru. Pursuant to article 75, recognition of a foreign arbitral award may be refused only if the opposing party is able to provide proof of any of the following circumstances:

• The parties to the agreement were under some incapacity (according to the law applicable to them), or if said agreement is not valid (according to the law applicable to the agreement or, if no indication is made, to the law of the country in which the award was made).[8]

• The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case.[9]

• The award deals with a controversy not contemplated by or not falling within the scope of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement to arbitrate.[10]

• The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the parties' agreement, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.[11]

• The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article 75.8 states that if a request to set aside or suspend the award is filed before the competent courts of the country in which, or under the law of which, the award was issued; the Superior Court in charge of adjudicating the recognition request is entitled to delay its decision. Moreover, if the party seeking recognition so requires it, the court may order the opposing party to provide security.

According to article 75.3 (similar to article V.2 of the New York Convention), a court may refuse – ex officio – the recognition of a foreign arbitral award if the court finds that:

• the subject matter of the difference is not capable of settlement by arbitration under Peruvian law; or

• the award is contrary to international public policy.

It seems that in some cases this ex officio analysis by the courts may have been extended beyond of what it is established in the Arbitration Law. For instance, in Case 00161-2013-0-1817-SP-CO-02[12]

where the defendant had not opposed to the application for recognition by the claimant, the court analysed whether during the arbitral proceedings the former had been notified correctly. Unless the court was indeed ascertaining whether the award was not contrary to public policy (which was not explicitly said in the decision), the aforementioned analysis could have only been made if the defendant had raised the issue during the enforcement procedure.

Procedure – Recognition Of Foreign Arbitration Awards

Article 76 of the Arbitration Law deals with the procedural issues behind a request for recognition of a foreign arbitration award. The Superior Court (which in Peru has the function of a court of appeals) will have jurisdiction over the procedure, instead of a trial court.[13]

According to article 76.1 of the Arbitration Law the party seeking enforcement shall present with its claim an original or a copy of the award complying with the requirements of article 9. Article 9 for its part, requires that any foreign document shall be authenticated in conformity

with the law of the country of origin of the document and shall be certificated by Peruvian diplomatic agents or similar.[14] Furthermore, if the document is not in Spanish, a simple translation shall be provided unless the judicial authority considers that an official translation is necessary.

The party opposing recognition has 20 business days to object, and within 20 additional business days a hearing will take place to discuss the grounds for refusing recognition. The Superior Court then has the power to issue a ruling immediately after the hearing, or to do so within 20 business days after the hearing. In practice, courts usually take these additional 20 days to render a decision.

Unlike the procedure for seeking recognition and enforcement of foreign judgments (subject to several levels of review), the decisions made by the court in the context of a recognition request will only be subject to appeal if the Superior Court denies the request for recognition. In other words, if the Superior Court recognises the award, the decision will be final.

Procedure – Enforcement Of Foreign Arbitration Awards

Articles 77 and 68 of the Arbitration Law deal with the procedural issues behind the enforcement of a foreign arbitration award. If the award debtor does not fulfil the obligations contained in the award issued abroad, and Peruvian courts have recognised the award, the award creditor is entitled to file a claim seeking the enforcement of the arbitration award.

According to article 8 of the Arbitration Law, the judge specialised in commercial matters, or failing the latter, the civil judge of the place of the arbitration or the place where the award should display its effects, is the competent judge to decide upon application for enforcement of an arbitral award.[15] In this sense it is important for the claimant to distinguish between recognition and enforcement of awards. The Superior Court of Lima in a decision rendered on 29 March 2012 declared that the application for enforcement raised by the claimant before the aforementioned court was inadmissible since it is the judge specialised in commercial matters the competent one to decide upon enforcement of arbitral awards.[16]

The party applying for enforcement shall present before the court a copy of the arbitral award and any revision, interpretation, integration or exclusion of the latter rendered by the arbitral tribunal; as well as any enforcement measures taken by the arbitral tribunal.[17] The judge will immediately order the debtor to satisfy the award within a five-business-day deadline.[18]

Within the same deadline, pursuant to article 68.3 of the Arbitration Law, the debtor can oppose to the enforcement by providing: evidence that the award is suspended; or evidence that the award is vacated; or, evidence that the award was satisfied. Additional arguments are not allowed.

According to article 68.3 of the Arbitration Law, if the trial court rules in favour of the opposing party, the decision can be subject to appeal, and the appeal will suspend the effects of the decision made by the trial court.

CONCLUSION

Peruvian Arbitration Law has a modern approximation on cross-border arbitration, specifically on arbitration procedures seated outside Peru. The rules applicable (before and after the award is rendered) protect the arbitration agreement, provide assistance in the taking of evidence and in the enforcement of provisional measures and allow the recognition and enforcement of foreign arbitral awards.

Endnotes

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Summary

DIFFERENT THEORIES
RIGHTS AND OBLIGATIONS
PRACTICAL IMPLICATIONS

So far, Bolivia (2007), Ecuador (2009) and Venezuela (2012) have denounced the Convention on Settlement of Investment Dispute between States and Nationals of other States (the ICSID Convention). Although the ICSID Convention itself regulates the possibility of denouncing the ICSID Convention, different theories – which, in many cases, contain conflicting options – have arisen as regards the interpretation of the legal effects of denouncing the ICSID Convention.

Several issues have been discussed by ICSID Convention commentators, but they have mainly focused on the formation and revocation of consent in relation to investors. Although some of the theories support the contractual nature of the offer for ICSID arbitration contained in bilateral investment treaties (BITs) and in free trade agreements (FTAs) or in domestic laws, others claim that consent to international arbitration is an irrevocable obligation.

The different theories can be divided into four groups, as follows:

- the contractual approach (ie, those that consider that the offer for ICSID arbitration can be revoked before it has accepted);
- those that consider it a firm offer;
- those that consider that it is not an offer but rather an international obligation derived from a unilateral act of state; and
- those that consider that the ICSID arbitration offer is irrevocable if it creates lawful expectations.

For our part, we agree on the contractual nature of the arbitration offer made by states to investors. However, from our point of view, the arbitration offer can be irrevocable in those cases where lawful expectations have been created among investors.

Moreover, the obligation on ICSID's jurisdiction is not only perfected when the investor accepts the offer, but rather when the BIT or FTA is ratified by both states. As from this very moment, each member state is obliged to reciprocally offer ICSID arbitration to the nationals of the other state.

So far, attention has focused on the possibility of revoking or not revoking the state's consent in relation to the 'direct beneficiary' of the offer (ie, the investor in the investor– state relationship). However, article 72 not only refers to the investors' rights; in fact, it also appears to refer to the obligations related to ICSID jurisdiction, perfected among member states before the denunciation of the ICSID Convention.

DIFFERENT THEORIES

Contractual Approach But Revocable Offer

This theory, inspired by a clear-cut contractual perspective (offer-acceptance) and advanced by Professor Schreuer, does not confer much legal effect to the 'offer' that has not yet been accepted.

In fact, when referring to the interpretation of the word 'consent' in article 72, Professor Schreuer points out that, just as contracts are formed by an offer and a matching acceptance, the irrevocability of the offer of consent can only take place once such offer has been accepted and consent has therefore been 'perfected'.

Under this theory, article 72 refers to 'perfected consent'. Therefore, it would only operate to preserve the rights and obligations of investors in respect of disputes in which both the host state and the investor have consented prior to receipt of the notice of denunciation by the depositary.[2]

Some have criticised this theory stating that using contractual analogy leads to the mistaken conclusion of identifying the term 'consent' with the notion of 'common consent' (consent by both parties to the dispute) or 'arbitration agreement.' This identification results in a 'false analogy' because in the ICSID Convention the word 'consent' is used to refer to 'individual consent' as much as it is used to refer to 'common consent'.[3]

Firm Offer

Professor Gaillard, without directly rejecting Professor Schreuer's contractual approach, warns about the particular meaning that should be given to the word 'consent' in article 72. He contends that, regardless of denunciation of the Convention, the possibility of ICSID arbitration will depend on the wording used in 'the arbitration clause' contained in the applicable BIT or FTA.[4]

Mantilla-Serrano, following Gaillard's path, argues that article 72 refers to unilateral or individual consent and not 'common consent'. He points out that the contractual notions of offer and acceptance alongside article 25 of the Convention should not come into play because the binding force of the ICSID Convention after its denunciation is entirely governed by article 72 and not by article 25.[5]

International Obligation Derived From A Unilateral Act Of The State

Nolan and Sourgens, on the other hand, contend that state consent expressed in a BIT, FTA or domestic law cannot be considered as a mere offer to arbitrate, not even as firm offer, but rather as an 'independent international obligation'.[6]

Professor Hirsch, who had taken a similar view in the past, states that according to international law, also applicable to domestic legislations, the unilateral state consent to ICSID arbitration may be equivalent to an irrevocable unilateral act pursuant to international law and the doctrine of estoppel.[7]

This view is inspired on the general principle recognised by the International Law Commission stating that a unilateral declaration intended to produce legal effects to the state making the declaration cannot be revoked arbitrarily.[8] References made in ***SPP v Egypt***,[9] ***Amco v Indonesia***[10] and the dissenting vote in ***Siag & Vecchi v Egypt***,[11] along with the International Court of Justice's decision in Nuclear Test all seem to support this theory.[12] But while some support this theory, others have criticised it.[13]

Contractual Approach But Irrevocable Offer, If It Has Created Legitimate Expectations

As pointed out by Professor Schreuer: 'Like any form of arbitration, investment arbitration is always based on an agreement.'[14] Just as with commercial arbitration, an arbitration agreement may exist or be entered into without the existence of a previous contractual relationship between the parties.[15]

Nevertheless, article 25 should not come into play when determining whether or not the obligations arising out of consent to ICSID jurisdiction remain in force after its denunciation. In this regard, we agree with some commentators who argue that this matter is fully

governed by article 72.[16] But this does not mean that the contractual approach should not come into play when determining the formation of consent between states and investors.[17]

With the exception of mandatory arbitrations on specific subject matters, every arbitration (whether commercial or investment) presupposes an arbitration agreement.[18]

From our perspective, strictu sensu, a state's unilateral offer to arbitrate is part of a bilateral or multilateral negotiation process between states. Since the primary goal of that offer is to create an act not unilateral in nature, it should be considered to be definitely closer to being an act of a conventional nature because the fundamental purpose of that act transcends the unilateral framework in which it is created.[19]

Under international contractual principles, an offer that has not yet been accepted can be irrevocable in some cases. Aside from the obvious cases,[20] in our view, what makes an offer irrevocable is the legitimate expectations that offer has created.

The offer to arbitrate is irrevocable, even when there is no express provision ratifying it or a fixed term for its acceptance; provided the investor could reasonably assume that the offer was firm and has relied upon it when making his investments. As pointed out by Paulsson: 'The respect for the legitimate and pre-established expectations is an essential requisite [to keep] healthy international relations.'[21]

The principle of 'legitimate reliance' is modernly considered one of the principles, not just of international law, but also of the regulatory activity of public entities which must act in good faith within a legally sound framework and comply with the legitimate expectations created in their citizens by their administrative or regulatory action.[22]

In short, the revocation of a state's unilateral consent is arbitrary and thus ineffective when that offer created legitimate expectations in the investors when making their investments.

In fact, a state can hardly contend that a law whose main purpose is to promote foreign investments by affording them with protection through an offer to international arbitration could not create any legitimate expectations in foreign investors who actually made their investments before the revocation of such offer.[23]

RIGHTS AND OBLIGATIONS

Article 72 does not only refer to the investors' rights; it also refers to the obligations related to ICSID jurisdiction, perfected among member states before the ICSID Convention denunciation. We are under the impression that little attention has been given to this second state–state relationship. Although the content of each BIT or FTA should be carefully analysed in case of significant differences between both documents, most BITs or FTAs contain bilateral obligations (state–state) whereby a state undertakes before any potential denunciation of the ICSID Convention to offer ICSID arbitration to the nationals of another member state. This obligation on ICSID's jurisdiction is not perfected when the investor accepts the offer, but when the BIT or FTA is ratified by both states. As from this very moment, each member state is obliged to reciprocally offer ICSID arbitration to the nationals of the other state. It should be noted that it is not necessary for the investor to ask for ICSID arbitration in order for said obligation to arise or to be perfected. One thing is the fulfilment of an obligation; another thing is the origin of an obligation.

Moreover, the obligation to offer ICSID arbitration remains intact after the denunciation of the ICSID Convention for two reasons: it is enshrined in a treaty (BIT or FTA) that is independent

of the ICSID Convention; and it is expressly stated so in article 72. Article 72 also represents an exception to the nationality requirements contemplated in article 25(1) of the ICSID Convention. If the obligation to offer ICSID arbitration to the nationals of another state was perfected before the notice of denunciation was given, then the state that denounced the ICSID Convention or a national of said state could become a party to ICSID arbitration.

The state–state obligations arising out of consent to ICSID jurisdiction providing for ICSID arbitration and contained in BITs ratified by Bolivia, Ecuador and Venezuela with other states, and even with each other, are still enforceable by investors despite these countries' denunciations of the ICSID Convention.[24]

It is worth mentioning that the BITs entered into by Chile with Bolivia, Ecuador and Venezuela,[25] respectively, all provide as dispute resolution forums either domestic courts of the host state or ICSID arbitration at the investor's discretion. If the above interpretation does not prevail, then Chilean investors would be prevented from bringing their claims under arbitration and forced to submit their claims to Bolivian, Ecuadorian or Venezuelan courts, respectively.

Such a result would not only be absurd but would violate the legitimate expectations of Chilean investors who invested in these countries with the firm belief that future disputes would be submitted to a neutral forum such as international arbitration.[26]

The same thing can be said with respect to French and Peruvian investors. The Venezuela–France and Ecuador–Peru BITs also provide for ICSID arbitration or domestic courts as the only valid forums for resolving disputes.[27]

An even more absurd result would be produced in BITs providing for ICSID arbitration as the 'only' valid forum for resolving investment disputes. This appears to be the case with the Venezuela–Germany BIT.[28] An alternative interpretation proposes the use of the most-favoured nation (MFN) clause present in other BITs as a mean to avoid such an unjust result.[29] However, the procedural use of MFN clauses is still a highly debatable issue among tribunals.[30]

It is also worth adding that the vast majority of BITs contain survival clauses of 10 to 15 years in benefit of the investments made before their termination or denunciation. Such an extension in their validity also includes ICSID arbitration.[31]

Consequently, any revocation of an offer to arbitrate that already created legitimate expectations in foreign investors must be considered arbitrary and invalid.[32] This means that future investors in Bolivia, Ecuador and Venezuela seem to be the ones really affected by the Convention's denunciation since no legitimate expectations have been created in them.

Only future BITs or FTAs entered into by Bolivia, Ecuador and Venezuela with other states will be affected by the ICSID Convention's denunciation.

PRACTICAL IMPLICATIONS

It should be noted that most BITs and FTAs, besides the ICSID Supplementary Mechanism, contemplate alternative arbitration forums – such as UNCITRAL – in the event that ICSID arbitration is not available, whereas other treaties provide for a hierarchy of forums whereby some have priority over others (ie, the investor must first exhaust a particular forum to submit its disputes and can only make use of the remaining forums in the event of unavailability of

the first forum). The latter example is the case for the majority of BITs ratified by Venezuela.[33]

In our opinion, the existing interpretation difficulties cannot be constructed as non-availability of ICSID arbitration. It is worth highlighting what was stated in the ***Nova Scotia v Venezuela*** case. Here, the meaning of 'availability' of the Supplementary Mechanism was analysed. The plaintiff argued that it meant 'ready for its immediate use' or 'something with good chances of success'. It supported its position by expert statements, such as those made by Professor Rudolph Dolzer, who came to the conclusion that the ICSID Supplementary Mechanism cannot be considered available when 'reasonable doubt' exists as to whether or not the parties can use it. The court rejected the arguments put forward by the plaintiff and established that 'available' refers to the possibility of exercising the right to start an arbitration proceeding, whether under the ICSID regulations or under the Supplementary Mechanism Regulations.

As we can see, depending on how the treaty has been drawn up, resorting to some of these alternative forums could be a serious mistake if ICSID arbitration is actually available because they may lack jurisdiction. As is often the case, the easy path does not seem to be a good option, neither for investors that wish to avoid engaging in the aforesaid discussion, nor for states that wish to avoid acquired international commitments.[34]

Notes

1. See Schreuer, Malintoppi, Reinisch and Sinclair, The ICSID Convention: A Commentary, Cambridge University Press 2001, p. 1280, para 6. Also see Sander, Barrie, 'Venezuela's denunciation of ICSID: the consequences', ***Global Arbitration Review***, Volume 7, Issue 2, 14 February 2012.
2. Id. The depositary of the ICSID Convention is the International Bank for Reconstruction and Development, also known as the World Bank.
3. See Garibaldi, Oscar, 'On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy', ***TDM*** 1 (2009), www.transnational-dispute-management.com.
4. Gaillard, Emmanuel, 'The Denunciation of the ICSID Convention', ***New York Law Journal***, 26 June 2007, Vol. 237 No. 122.
5. See Mantilla-Serrano, Fernando, 'La denuncia de la Convención de Washington, ¿Impide el recurso al CIADI?', ***Revista Peruana de Arbitraje***, No. 6, 2008, p. 214.
6. Nolan, Michael and Sourgens, F G, 'The Interplay Between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study', ***TDM***, Provisional Issue, September 2007.
7. See Hirsch, Moshe, ***The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes***, Martinus Nijhoff Publishers, 1993, pp. 53–54.
8. Working Group Report of the International Law Commission, 58th Session (1 May to 9 June and 3 July to 11 August of 2006), par 4.
9. ***Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt***, ICSID Case No. ARB/84/3.
10. ***Amco Asia Corporation and others v Republic of Indonesia***, ICSID Case No. ARB/81/1.
11.

Waguih Elie George Siag and Clorinda Vecci v Arab Republic of Egypt, ICSID Case No. ARB/05/15.

12. ***Case Concerning Nuclear Test (Australia v France***), Judgment of 20 December 1974, ICJ, Rep.1974.
13. In favor Tejera, Victorino, 'Do Municipal Investment Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study', ***Investment Treaty Arbitration and International Law***, edited by Ian A Laird and Todd J Weiler, JurisNet, LLC, New York, 2009, pp. 109–118. Against this position, see Suárez Anzorena, Ignacio. 'Consent to Arbitration in Foreign Investment Laws', ***Investment Treaty Arbitration and International Law***, 2009, pp. 78–79. This author considers that the existence and the scope of consent to investment arbitration contained in a domestic investment law can only be determined in accordance with the framework under which it was issued, in other words, pursuant to domestic law and considers a 'fallacy of presumption' to characterise a domestic law as a unilateral obligation governed by international law.
14. Schreuer, Christoph, 'Consent to arbitration (updated 02/2007)', TDM 5 (2005), p. 1, www.transnational-dispute-management.com/article.asp?key=555.
15. Such is the case for commercial arbitrations arising out of, for example, tort cases to determine liability or damages. And that is the case for most investment arbitrations which arise to determine the potential international liability of a state.
16. Mantilla Serrano, Fernando. 'La denuncia de la Convención de Washington…', op cit, p. 214.
17. Against this view, see Mantilla Serrano, Fernando, 'La denuncia de la Convención de Washington…', op cit, p. 214.
18. Youssef, Karim, Consent in Context: Fulfilling the Promise of International Arbitration (Multiparty, Multi-Contract, and Non-Contract Arbitration), West Thomson, 2009, pp. 55–56 citing Adam Samuel, Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and German Law, 1989, p. 96.
19. Mezgravis, Andrés, 'The Standard of Interpretation Applicable to Consent and its Revocation in Investment Arbitration', ***TDM 2*** (2011), pp. 13–14.
20. When the offer expressly provides for its irrevocability for a certain period of time.
21. Paulsson, Jan, 'El Poder de los Estados para hacer Promesas Significativas a los Extranjeros', ***TDM 1*** (2009), p. 21, www.transnational-dispute-management.com/article.asp?key=1301.
22. See ***Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan***, ICSID Case No. ARB/05/16, Award, 29 July 2008. In this case, the tribunal held that independent of article 6(1), it is also well established in international law that a state may not take away accrued rights of foreign investor by domestic legislation abrogating the law granting these rights. In contrast, see ***Ruby Roz Agricol LLP v Republic of Kazakhstan***, UNCITRAL Award on Jurisdiction of 1 August 2013, where it was rejected the argument that the foreign investor had 'accrued right' to arbitration since the arbitration clause in the FIL calls for the right to arbitration to be perfected by the investor's written consent, not by an investment or by a claim arising.

Hence, the tribunal held that the offer is required to be accepted in writing before it was withdrawn. To support this argument, the tribunal cited Schreuer, Christoph, 'The ICSID Convention: A Commentary: a Commentary on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States', 2nd edition 2009, para 618.

23. See Mezgravis, Andrés and González, Carolina, 'Denunciation of the ICSID Convention: Two problems, one seen and one overlooked', ***TDM*** 7 (2012), p10. See also Mezgravis, Andrés, 'The Standard of Interpretation Applicable to Consent...', op cit, p31. The Spanish version can be found in ***Revista Internacional de Arbitraje***. Legis, Número 13, Bogotá, July–December 2010. Also in***Revista Ecuatoriana de Arbitraje*** (2011).

24. See article 9(3) of the BIT between Ecuador and Venezuela, which provides for ICSID arbitration as the first venue. Therefore, the obligation arising out of consent to ICSID jurisdiction between Ecuador and Venezuela to provide for ICSID arbitration to the their respective nationals was perfected between the said states when the BIT entered into force (1 February 1995), that is to say, before Ecuador's and Venezuela's denunciation of the ICSID Convention. Therefore, it is covered by article 72 of the ICSID Convention. It is important to note that in 2009 the Ecuadorian President requested before the National Assembly the denunciation of 13 BITs entered into by Ecuador with Germany, the United Kingdom and Northern Ireland, Finland, China, Switzerland, Chile, Venezuela, Sweden, USA, Canada, the Netherlands, Argentina and France under the argument that the ICSID arbitration clauses were incompatible with the recently approved Constitution. Such request was later returned since it required the previous and binding ruling of the Constitutional Court which later ruled the unconstitutionality of the BITs with Germany, UK and Northern Ireland, and later China, Finland, Switzerland, Chile, France, Canada, Sweden, the Netherlands, USA and Venezuela. They were later returned to the National Assembly which we understand approved the termination of the BITs with Germany, UK and Northern Ireland, China, Finland and Switzerland. In this regard, see www.aebe.com.ec/data/files/noticias/Noticias2010/Denuncias_Tratados_Protecci%C3%B3n_Inversiones.pdf. To the best of our knowledge, the BIT between Ecuador and Venezuela has not yet been terminated by Ecuador. See www.burodeanalisis.com/2011/06/06/denuncia-de-tratados-bilaterales-tambien-preocupa-a-la-ue/. In any event, it is important to notice that the majority of all of these BITs, including the BIT between Ecuador and Venezuela, contain a survival clause of 10 years for investments made before termination.

25. See article X.2.a and b of the BIT between Bolivia and Chile; article X.2 and 3 of the BIT between Ecuador and Chile, and article 8.2 of the BIT between Venezuela and Chile. We understand the BIT between Ecuador and Chile has not yet been terminated by Ecuador's National Assembly. In any event, article XI (2) of this BIT contains a 10-year survival clause protecting Chilean investments made before termination.

26. In this regard, see Sornarajah, M, ***The International Law on Foreign Investment-***, Cambridge University Press, Third Edition, p. 250 which states: ***Arbitration, in a neutral State before a neutral tribunal, has traditionally been seen as the best method of securing impartial justice to him [foreign investor]. Where an international treaty backs him up by creating an obligation on the host state to submit to any arbitral proceedings brought against it by the foreign investor, a major step could be said to have been taken towards investment protection.***

27. See article 8.2 of the BIT between Venezuela and France, and article 8.2 of the BIT between Ecuador and Peru.
28. See article 10.2 of the BIT between Venezuela and Germany.
29. Gaillard, 'The Denunciation of the ICSID Convention…' op cit, supra note 4.
30. Alschner, Wolfgang; Berdajs, Ana; and Lanovoy, Vladyslav, 'Legal basis and effect of denunciation under international investment agreements', Graduate Institute of International and Development Studies, Geneva, 2010, pp. 38–39 and note 62.
31. See, for example, article 14.3 of the BIT between Venezuela and Netherlands providing for a survival clause of 15 years in respect of investments made before the date of termination, which in the case of Venezuela occurred on 30 April 2008.
32. In this regard, see Mezgravis, Andrés, 'The Standard of Interpretation Applicable to Consent…' op cit, pp. 33–35 which states: ***For this reason, it is submitted that the purported revocation of the offer to arbitrate contained in article 22 of the Venezuelan Investment Law through the mentioned decision No. 1541 of the Supreme Tribunal of Justice [ruling that article 22 does not contain a standing offer to ICSID arbitration] is clearly arbitrary and ineffective for those investors who made their investments in Venezuela before the publication of that decision. For investments made after the publication of the decision the matter is more complicated and debatable. There are two important reasons in support of the ineffectiveness of the revocation in such scenario: i) article 22 has not been repealed, and ii) the interpretation made by the Venezuelan Supreme Tribunal of Justice is not binding on ICSID tribunals; in fact, the decision itself recognises it.***
33. Out of the 25 ratified BITs (including the BIT with the Netherlands which was terminated effective as of 1 November 2008), the majority, that is, 16, contain dispute resolution clauses providing for a hierarchy of arbitral forums (ie, first ICSID, second ICSID Additional Facility and third UNCITRAL ad hoc arbitration), while only three BITs can be regarded as alternative within the investor's discretion (ie, BITs with Iran, Argentina and Russia, although the latter appears to require some level of cooperation from the host state). On the contrary, in Ecuador's and Bolivia's case, most BITs provide for alternative arbitration forums in the investor's discretion.
34. See: Mezgravis, Andrés and González, Carolina. 'Denunciation of the ICSID Convention…', op cit, p16.

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